

2009

Young Living Essential Oils, LC, a Utah limited liability company v. Carlos Marin : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Scott B. Mitchell; Attorney for Defendant.

Barnard N. Madsen; Scott D. Preston; Joseph M. Hepworth; Fillmore Spencer LLC; Attorneys for Plaintiff.

Recommended Citation

Brief of Respondent, *Young Living Essential Oils v. Marin*, No. 20090875.00 (Utah Supreme Court, 2009).
https://digitalcommons.law.byu.edu/byu_sc2/2991

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

YOUNG LIVING ESSENTIAL OILS,
LC, a Utah limited liability company,

Plaintiff / Appellee / Respondent,

v.

CARLOS MARIN,

Defendant / Appellant / Petitioner.

BRIEF OF RESPONDENT

Case No. 20090875-SC

BRIEF OF RESPONDENT

**ON CERTIORARI FROM THE COURT OF APPEALS' UNPUBLISHED
OPINION AFFIRMING FINAL ORDERS OF THE FOURTH JUDICIAL
DISTRICT COURT, UTAH COUNTY, PROVO DEPARTMENT, THE
HONORABLE SAMUEL MCVEY PRESIDING**

Scott B. Mitchell (5111)
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121

Attorney for Carlos Marin

Barnard N. Madsen (4626)
Scott D. Preston (11019)
Joseph M. Hepworth (4337)
FILLMORE SPENCER LLC
3301 N. University Avenue
Provo, Utah 84604

Attorneys for Young Living Essential
Oils, LC

**FILED
UTAH APPELLATE COURTS**

APR 19 2010

IN THE UTAH SUPREME COURT

YOUNG LIVING ESSENTIAL OILS,
LC, a Utah limited liability company,

Plaintiff / Appellee / Respondent,

v.

CARLOS MARIN,

Defendant / Appellant / Petitioner.

BRIEF OF RESPONDENT

Case No. 20090875-SC

BRIEF OF RESPONDENT

**ON CERTIORARI FROM THE COURT OF APPEALS' UNPUBLISHED
OPINION AFFIRMING FINAL ORDERS OF THE FOURTH JUDICIAL
DISTRICT COURT, UTAH COUNTY, PROVO DEPARTMENT, THE
HONORABLE SAMUEL MCVEY PRESIDING**

Scott B. Mitchell (5111)
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121

Attorney for Carlos Marin

Barnard N. Madsen (4626)
Scott D. Preston (11019)
Joseph M. Hepworth (4337)
FILLMORE SPENCER LLC
3301 N. University Avenue
Provo, Utah 84604

Attorneys for Young Living Essential
Oils, LC

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	v
I. JURISDICTION	1
II. NATURE OF THE CASE.....	1
III. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW.....	2
1. Can the covenant of good faith and fair dealing be used to add new terms to an expressly integrated written agreement? Can the covenant of good faith and fair dealing circumvent the parol evidence rule?	2
2. Are attorney fees issues preserved for appeal where the losing party fails to timely object?.....	2
IV. DETERMINATIVE RULES.....	3
V. STATEMENT OF THE CASE	3
VI. STATEMENT OF FACTS.....	6
A. Valid Contract	6
B. Young Living’s Obligations.....	7
C. Marin’s Obligations.....	7
D. Young Living’s Performance and Marin’s Breach	8
E. Damages	9
VII. SUMMARY OF ARGUMENT.....	10
A. Summary judgment	10
B. Attorney fees	11

VIII. ARGUMENT	11
A. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER EITHER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING OR THE PAROL EVIDENCE RULE, MARIN’S AFFIDAVIT WAS NOT ADMISSIBLE IN SUMMARY JUDGMENT TO ADD A NEW TERM TO THE PARTIES’ EXPRESSLY INTEGRATED WRITTEN AGREEMENT	11
1. No evidence of “a course of dealing.”	13
2. Instead, extrinsic evidence of a new term	13
3. And a dispositive undisputed fact: a clear integration clause	13
4. The Proper Legal Framework for Analysis.....	15
a. Contract interpretation is a question of law	16
b. The threshold question: Is the agreement integrated?.....	16
c. Whether a contract is integrated is a preliminary question of fact for determination by the court that may be resolved in summary judgment.....	17
d. “If a contract is integrated, parol evidence is admissible only to clarify ambiguous terms.”	17
e. “[W]hether a contract is ambiguous is a question of law reviewed for correctness.”	18
f. “If a contract is integrated, parol evidence ... is ‘not admissible to vary or contradict the clear and unambiguous terms of the contract.’”	18
g. “[I]n the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of integration.”	18

h.	“Extrinsic evidence is appropriately considered, even in the face of a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality.”	18
i.	The covenant of good faith and fair dealing cannot be construed to add new terms to the parties’ agreement	19
j.	“[T]he degree to which a party to a contract may invoke the protections of the covenant [of good faith and fair dealing] turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms.”	19
5.	Harmonizing <i>Oakwood, Brown, and Tangren</i>	19
a.	Court of Appeals: <i>Oakwood Village, LLC v. Albertsons, Inc.</i>	20
b.	Defendant-Petitioner Marin: <i>Brown v. Moore.</i>	22
c.	Plaintiff-Respondent Young Living: <i>Tangren Family Trust v. Tangren.</i>	25
	<u>Table 1</u> : Summary of Issues: <i>Oakwood, Brown, and Tangren</i> – and this case	28
6.	Proposed holdings harmonizing <i>Oakwood, Brown, and Tangren</i>	28
	<u>Table 2</u> : Integration: Clear Integration Clause v. etc.	31
	<u>Table 3</u> : Integration: Parol Evidence Rule and etc.....	32
7.	Conclusion.....	33
B.	MARIN FAILED TO PRESERVE THE ISSUE OF ATTORNEY FEES FOR APPEAL	34
1.	“No findings of fact as to attorney fees.”	35
2.	“Simple breach of contract case.”	35
VIII.	CONCLUSION	36

Addendum 1 – *H.U.F. v. W.P.W.* ____ P.3d ____, 2009, WL 304711 (Utah 2009)

Addendum 2 – Court of Appeals Opinion Below: *Young Living Essential Oils v.*

Marin, 2009 UT App 272 (unpublished decision)

Addendum 3 – Affidavit of Carlos Marin (R. 127)

Addendum 4 – Field Advisor to Executive Board Distributor Agreement (R. 6)

Addendum 5 - *United States Construction Corporation v. Harbor Bay Estates,*

Ltd., 876 N.E.2d 637, (Ohio 2007)

TABLE OF AUTHORITIES

STATE CASES

<i>AGI v. First Affiliated Securities</i> , 912 F.2d 1238 (10 th Cir. 1990).....	17
<i>Andalex Resources, Inc. v Myers</i> , 871 P.2d 1041 (Utah App. 1994).....	15, 19, 22
<i>Brehany v. Nordstrom, Inc.</i> , 812 P.2d 48 (Utah 1991)	15, 19, 21, 24
<i>Brown v. Moore</i> , 973 P.2d 950 (Utah 1998)	14, 15, 19, 22-25, 28-30, 32-33
<i>Bullfrog Marina, Inc. v. Lentz</i> , 28 Utah 2d 261, 501 P.2d 266 (Utah 1972)	16, 17
<i>Dalton v. Jerico Constr. Co.</i> , 642 P.2d 748 (Utah 1982).....	21
<i>Dennis Dillon Oldsmobile, GMC v. Zdunich</i> , 668 P.2d 557, 561 (Utah 1983)	16
<i>Ford v. Am. Express Fin. Advisors, Inc.</i> , 2004 UT 70, 98 P.3d 15 (Utah 2004)	17
<i>H.U.F. v. W.P.W.</i> ____ P.3d ____, 2009, WL 304711 (Utah 2009).....	2, 34
<i>Hall v. Process Instruments & Control</i> , 890 P.2d 1024, 1026-27 (Utah 1995).....	
.....	16, 18, 25, 29, 31, 36
<i>Jensen v. Sawyers</i> , 2005 UT 81, 130 P.3d 325 (Utah 2005).....	3
<i>Kendall Insurance, Inc. v. R & R Group, Inc.</i> , 189 P.3d 114 (Utah App. 2008)	3
<i>Malibu Inv. Co. v. Sparks</i> , 2000 UT 30, 996 P.2d 1043 (Utah 2000).....	19
<i>McNulty v. PLS Acquisition Corp.</i> , 8th Dist. No. 79025, 2002-Ohio-7220, 2002 WL 31875200	33
<i>Morris v. Mountain States Tel. & Tel. Co.</i> , 658 P.2d 1199 (Utah 1983).....	16
<i>Oakwood Village LLC v. Albertsons, Inc.</i> , 2004 UT 101, 104 P.3d 1225 (Utah 2004).....	
.....	5, 15, 19-22, 25, 28-30, 32, 33
<i>Smith v. Grand Canyon Expeditions</i> , 2003 UT 57, 84 P.3d 1154 (Utah 2003).....	19

<i>St. Benedicts Dev. v. St. Benedicts Hosp.</i> , 811 P.2d 194, 200 (Utah 2001)	21, 22
<i>State v. Levin</i> , 2006 UT 50, 144 P.3d 1096 (Utah 2006)	17
<i>State v. Low</i> , 2008 UT 58, 192 P.3d 867 (Utah 2008)	2, 34
<i>State v. Pena</i> , 869 P.2d 932 (Utah 1994)	2
<i>Tangren Family Trust v. Tangren</i> , 2008 UT 20, 182 P.3d 326, 332 (Utah 2008)	
.....	2, 15-20, 22, 25-33, 35-36
<i>Union Bank v. Swenson</i> , 707 P.2d 663, 665 (Utah 1985)	16, 18
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998)	3

OTHER STATES' CASES

<i>United States Construction Corporation v. Harbor Bay Estates, Ltd.</i> , 876 N.E.2d 637, (Ohio 2007)	33
---	----

STATE STATUTES

Utah Code Ann. § 78A-3-102(5).....	1
------------------------------------	---

STATE RULES

Utah Rules of Appellate Procedure, Rule 51.	1
Utah Rules of Appellate Procedure, Rule 51(b)(4).	2
Utah Rules of Civil Procedure, Rule 6(e)	34
Utah Rules of Civil Procedure, Rule 7(c)(3)(A) and (B)	14, 18
Utah Rules of Civil Procedure, Rule 7(f)(2)	3, 34
Utah Rules of Civil Procedure, Rule 12(b)(6)	20, 21
Utah Rules of Civil Procedure, Rule 56(c)	3

OTHER SOURCES

<i>Restatement (Second) of Contracts</i> § 214.....	18
---	----

IN THE UTAH SUPREME COURT

YOUNG LIVING ESSENTIAL OILS,
LC, a Utah limited liability company,

Plaintiff / Appellee / Respondent,

v.

CARLOS MARIN,

Defendant / Appellant / Petitioner.

BRIEF OF RESPONDENT

Case No. 20090875-SC

BRIEF OF RESPONDENT

I. JURISDICTION

The Court has jurisdiction pursuant to the 29 January 2010 Order granting the Petition for Writ of Certiorari filed by Petitioner. Utah Code Ann. § 78A-3-102(5); Utah R. App. P. 51.

II. NATURE OF THE CASE

This Court granted review of a 24 September 2009 opinion of the Utah Court of Appeals affirming a 26 March 2008 Order of the Fourth District Court (Judge Samuel McVey) granting the motion for partial summary judgment filed by Respondent Young Living Essential Oils, LC (R. 451-462), and the trial court's 12 June 2008 Final Judgment in favor of Respondent Young Living awarding damages and attorney fees (R. 500-505, 563-565).

III. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Can the covenant of good faith and fair dealing be used to add new terms to an expressly integrated written agreement? Can the covenant of good faith and fair dealing circumvent the parol evidence rule?¹ This Court reviews questions of law for correctness, giving no deference to the trial court. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). This Court reviews the factual determination that an agreement is integrated under a clearly erroneous standard. *Tangren Famly Trust v. Tangren*, 2008 UT 20 ¶ 11, 182 P.3d 326, 329 (Utah 2008).

2. Are attorney fees issues preserved for appeal where the losing party fails to timely object?² “To preserve an issue for appeal, the appellant must have raised ‘a *timely* and specific objection’ before the trial court. We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review.” *H.U.F. v. W.P.W.* ___ P.3d ___, 2009, WL 304711 (Utah 2009) (*quoting State v. Low*, 2008 UT 58, ¶ 17, 19, 192 P.3d 867, 880 (Utah 2008) (emphasis added) (Copy at Addendum 1)).

¹ Pursuant to Rule 51(b)(4), Utah Rules of Appellate Procedure, Respondent believes this statement of the issues was presented or is “fairly included” in the petition for certiorari (Petition ¶ 1 at 1), and in the issue ordered by the Court for review, to wit: “Whether the court of appeals erred in its assessment of Petitioner’s argument that Respondent breached the covenant of good faith and fair dealing.”

² Pursuant to Rule 51(b)(4), Utah Rules of Appellate Procedure, Respondent believes this statement of the issue was presented or is “fairly included” in the petition for certiorari (Petition ¶ 2 at 1), and in the issue ordered by the Court for review, to wit: “Whether the court of appeals erred in affirming the district court’s award of attorney fees.”

Assuming the issue has been preserved, “[t]he standard of review on appeal of [the amount of] a trial court's award of attorney fees is patent error or clear abuse of discretion.” *Kendall Insurance, Inc. v. R & R Group, Inc.*, 189 P.3d 114, ¶ 12 at 118 (Utah App. 2008) (citing *Jensen v. Sawyers*, 2005 UT 81, ¶ 127, 130 P.2d 325, 328 (Utah 2005) (alteration in original) (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998))).

IV. DETERMINATIVE RULES

Summary Judgment - Rule 56(c), Utah Rules of Civil Procedure:

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Preservation – Rule 7(f)(2), Utah Rules of Civil Procedure:

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

V. STATEMENT OF THE CASE

On 26 July 2006, Plaintiff/Respondent Young Living Essential Oils, LC, a Utah limited liability company (“Young Living”), filed its complaint against

Defendant/Petitioner Carlos Marin (“Marin”), for breach of contract, unjust enrichment, quantum meruit, fraud, breach of implied covenant of good faith and fair dealing, and negligent misrepresentation in the Fourth District Court. (R. 1-23).

On 18 December 2006, Marin filed his Amended Answer. (R. 52-63).

On 21 March 2007, Young Living filed its Motion for Partial Summary Judgment (Breach of Contract Claim) (R. 74) with a supporting Memorandum and accompanying affidavits (R. 69-72, 75-105). On 4 April 2007, Marin filed his Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment (R. 110-119), with a supporting affidavit (R. 120-127). On 13 August 2007, Young Living filed its Reply and Opposition to Defendant’s Counter-Motion for Partial Summary Judgment (R. 130-170; see also Errata at R. 308-311), with supporting affidavits and declarations (R. 171-287). On 27 August 2007, Marin filed his Reply (R. 293-295).

At a 1 October 2007 hearing on the motions, the trial court (Judge Samuel McVey) granted Young Living’s motion for partial summary judgment on its contract claim and denied Marin’s cross-motion for partial summary judgment. (R. 312). On 26 March 2008, the trial court signed the Order granting Young Living’s motion for partial summary judgment and denying Marin’s cross-motion for partial summary judgment (R. 451-462).

On 27 May 2008, Young Living filed a motion to voluntarily dismiss its remaining claims against Marin, filed its affidavit of attorney’s fees and costs (R. 463-495), and submitted a proposed Final Judgment (R. 503-505).

On 11 June 2008, Marin filed an Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit (R. 496-499).

On 12 June 2008, the trial court entered the Order dismissing Young Living's remaining claims (R. 500-502) and entered its Final Judgment (R. 503-505).

On 14 July 2008, Marin filed his Notice of Appeal (R. 513-514).

On 24 September 2009, without hearing oral argument and in an unpublished memorandum decision (Addendum 2), the Utah Court of Appeals affirmed the trial court's judgment. Quoting this Court's opinion in *Oakwood Village LLC v. Albertsons, Inc.*, the court of appeals held that, "[w]hile a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new, independent rights or duties."³ Since "no obligation regarding marketing tools was made a part of the written agreement," the court of appeals rejected "Marin's argument that the implied covenant of good faith and fair dealing can be used to incorporate extrinsic evidence of a contemporaneous oral agreement, where the parties' [written] agreement was integrated."⁴

The court of appeals also held that because Marin had failed to timely file an objection, he had not preserved the attorney fees issue for appeal.⁵

³ Addendum 2 at 3, *quoting Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1225, 1239 (Utah 2004).

⁴ *Id.*

⁵ *Id.* at 3-4.

On 26 October 2009, Marin filed a Petition for Writ of Certiorari. On 29 January 2010, this Court granted the petition.

VI. STATEMENT OF FACTS

The following undisputed facts are taken verbatim from the district court's 26 March 2008 Order (R. 462-458) except that, pursuant to Rule 24(d), Utah Rules of Appellate Procedure, "Young Living" replaces "Plaintiff," and "Marin" replaces "Defendant" here. The "Facts" outlined in paragraphs 12-20 of Petitioner's brief (Pet. Br. at 6-9) were rejected by the trial court and court of appeals (and were contradicted by Young Living's submissions at the trial court – *see* R. 171-287).

A. Valid Contract

1. After negotiations, Plaintiff Young Living Essential Oils, LC ("Young Living") a Utah corporation, ultimately executed a written agreement ("Agreement") with Defendant Carlos Marin ("Marin") on 12 January 2005.

2. In their Agreement, Marin expressly represented and warranted that he had "significant experience as a Distributor/Leader," had "numerous contacts with potential Distributor/Leaders" whom he could "bring to the Company and sign as new distributors with the Company," and had "successful, favorable experience in providing Services such as the duties as contemplated herein."

3. Paragraph 18, the last paragraph of their Agreement directly above the signature blocks, is labeled "Entire Agreement" (underline in original) and states in part: "there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein."

B. Young Living's Obligations

4. Under paragraph 4 of their Agreement, Young Living agreed to pay Marin advance payments of

\$25,000 on execution of the Agreement (12 January 2005);

\$25,000 on 15 February 2005;

\$25,000 on 15 March 2005, and

\$25,000 on 15 April 2005.

5. According to their Agreement, these advances and other specified performance bonuses were to help Marin devote “all his time and attention into [sic] recruiting additional distributors underneath him and training them” and were expressly intended “to entice [Marin] to quickly build an organization by devoting the necessary time to it. Also, [they] will provide him with a quick resource of cash to build the business.”

6. Under paragraphs 4 and 4.1, these advanced amounts were to be offset by any payments due Marin for commissions and “Fast Cash” bonuses.

7. Under paragraph 4.3, Young Living gave Marin a product credit of \$5,000 for January 2005, and \$5,000 for February 2005 “to be used for samples in attracting new Distributor/Leaders.”

C. Marin's Obligations

8. Under paragraph 3.3 of their Agreement, Marin agreed to “devote his full time and attention to recruiting new Distributor/Leaders” to sell Young Living's products.

9. Under paragraph 3.4 of their Agreement, Marin agreed that he would meet the following performance guarantees of cumulative “auto ship” sales volume by the specified dates:

\$5,000 by 15 February 2005;

\$30,000 by 15 March 2005;

\$100,000 by 15 April 2005;

\$300,000 by 15 May 2005;

\$600,000 by 15 June 2005, and

\$900,000 by 15 July 2005.

10. Paragraph 6.1 of their Agreement provides for Marin’s payment of Young Living’s “loss and damage” and “legal fees” arising from “contravention ... of any of the terms and conditions imposed on [Marin] pursuant to this Agreement.”

D. Young Living’s Performance and Marin’s Breach

11. On 12 January 2005, in connection with the execution of their Agreement, Young Living paid Marin a \$25,000 advance.

12. On 15 February 2005, Marin met his \$5,000 cumulative “auto ship” sales volume performance guarantee under paragraph 3.4 of his Agreement.

13. Accordingly, on 15 February 2005, Young Living paid Marin another \$25,000 advance.

14. On 15 March 2005, Marin had failed to meet his \$30,000 cumulative “auto ship” sales volume performance guarantee under paragraph 3.4 of his Agreement.

15. On 15 March 2005, Young Living paid Marin another \$15,000 advance based on Marin's representation that he would meet his 15 March 2005 performance guarantee of \$30,000 in cumulative sales volume by 15 April 2005.

16. On 15 April 2005, Marin had failed to meet his 15 March 2005 \$30,000 (let alone his 15 April 2005 \$100,000) cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

17. Through June 2006, Marin had generated a grand total of less than \$36,000 in cumulative "auto ship" sales volume.

E. Damages

18. Young Living paid Marin \$65,000.00 in advances.

19. In 2005 and 2006, Marin earned a total of \$3,637.57 in commissions from Young Living.

20. Marin never earned "Fast Cash" bonus payments.

21. Paragraph 4 of the Agreement states that the "monies advanced to [Marin] will be offset by any payments due [Marin] under the Fast Cash Program as calculated below. Also, these payments will be offset by any commission payments due [Marin] each month as calculated by the standard commission payout plan. . . . If any of the advanced amounts are not repaid by the commission payouts or Fast Cash at the end of the guaranteed payments, these amounts will be deducted from any future commission payout"

VII. SUMMARY OF ARGUMENT

A. Summary judgment. This case involves an expressly integrated written agreement. Marin argues that, based on his affidavit submitted in response to Young Living's motion, his admitted failure to meet agreed-upon performance guarantees was excused because of Young Living's prior breach of the implied covenant of good faith and fair dealing by failing to provide "marketing tools" by a purported deadline. As a result, Marin argues, this Court should reverse the court of appeals' opinion affirming the trial court's judgment in favor of Young Living on its breach of contract claim.

Marin makes two supporting arguments:

(1) He claims he is not attempting through his affidavit to impose new, independent duties into the parties' Agreement; and

(2) He claims the parol evidence rule is not implicated by his affidavit because the implied covenant of good faith and fair dealing is a part of every contract. Petitioner's Brief ("Pet. Br.") 13-22.

Marin's arguments are without merit:

Marin did not offer his affidavit as evidence of the parties' "course of dealing" under the implied covenant of good faith and fair dealing, but as extrinsic evidence of an additional term.

Marin's affidavit thus implicates the parol evidence rule. While the implied covenant of good faith and fair dealing is a part of every contract, it may not be used to establish "new, independent duties" outside the parties' written agreement. Marin's reliance on the implied covenant is therefore misplaced. Marin's argument also ignores

the undisputed fact that the parties' Agreement contained a clear integration clause. The court of appeals was thus correct in concluding that under both the parol evidence rule and the covenant of good faith and fair dealing the trial court properly excluded Marin's affidavit from consideration in granting Young Living's motion for summary judgment.

B. Attorney fees. Marin argues that because the trial court's award of attorney fees was unconscionable and plainly erroneous, the court of appeals improperly held that Marin's objection to the award was untimely and he had therefore failed to preserve the issue for appeal.

The court of appeals was correct in concluding that Marin failed to preserve the attorney fees issue for appeal. Young Living agrees that it is not entitled to recover attorney fees related to its tort and other non-contract claims, and in connection with issues on which it did not prevail.⁶

VIII. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER EITHER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING OR THE PAROL EVIDENCE RULE, MARIN'S AFFIDAVIT WAS NOT ADMISSIBLE IN SUMMARY JUDGMENT TO ADD A NEW TERM TO THE PARTIES' EXPRESSLY INTEGRATED WRITTEN AGREEMENT

Marin claims Young Living's prior material breach of its obligation of good faith and fair dealing excused him from further performance under the parties' Agreement.

⁶ If Young Living prevails on this appeal, it will submit a revised affidavit of fees to the trial court excluding \$6,754.50 for work in connection with the additional claims in its complaint and issues on which it did not prevail below. If Young Living does not prevail on this appeal, the attorney fees issue will be moot.

(Pet. Br. 10). As evidence of Young Living's asserted breach, Marin submitted his affidavit outlining purported conversations with "plaintiff" Young Living before he signed the Agreement and with named individuals affiliated with Young Living after. Marin contends that he offered his affidavit not for the purpose of proving "new, independent rights or duties" or a "contemporaneous oral agreement," but to show "the parties' purpose, intentions and [his] justified expectations." (Pet. Br. 11).

Marin asserts his "justified expectation" was that Young Living would provide him with "marketing tools" by a specific date. (Pet. Br. 10-11, 13-21). In his affidavit, Marin asserted:

In order to induce me to enter in to the Agreement, plaintiff [Young Living] represented to me that it was nearing completion of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials (hereinafter referred to as the "marketing tools"). It was clearly understood by both plaintiff and myself that these marketing tools would be absolutely necessary for me to be able to meet my performance guarantees under the Agreement and it was represented to me that they would be available for use by February 1, 2005.

(Affidavit of Carlos Marin, dated 1 April 2007 ("Marin Affidavit"), paragraph 4; copy attached as Addendum 3).⁷

Marin's reliance on the covenant of good faith and fair dealing in support of the admissibility of his affidavit is misplaced for at least three reasons:

⁷ Marin has never identified the individual (or individuals) who purportedly made these representations, has not identified where or when they made, except to assert that it was prior to his signing the Agreement, and has not further described what "other marketing materials" means. Implicitly acknowledging that his assertions lack the required particularity, Marin has never claimed fraudulent inducement or fraud in connection with his entering the Agreement.

1. No evidence of “a course of dealing.” Marin’s affidavit provides no evidence of “a course of dealing” with Young Living that could have justified his expectation that he would receive “marketing tools” by a specified deadline; indeed, the signed Agreement was their first contract and *began* the “course of dealing” between these two parties (*see*, e.g., Marin Affidavit ¶ 3; Agreement [R. 120-127]);.

2. Instead, extrinsic evidence of a new term. Evidence to show a prior oral agreement about “marketing tools” and representations about when they would be ready is not “course of dealing” evidence, it is extrinsic evidence of “new, independent rights and duties” not contained in the parties’ subsequent, expressly-integrated written Agreement; and

3. And a dispositive undisputed fact: a clear integration clause. The clear integration clause directly over Marin’s signature in the Agreement⁸ forecloses any

⁸ The integration clause reads, in pertinent part:

Entire Agreement.

This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein. No supplement, modification, amendment, waiver or termination of this Agreement shall be binding unless executed in writing and signed by the Parties hereto. ...

IN WITNESS WHEREOF, the Parties have duly executed this Agreement on the date first written above. ... [Signed] CARLOS MARIN

(R. 6, copy at Addendum 4). Marin has never even addressed, let alone disputed, this clear integration clause. *See* R. 63 ¶ 2 and 62 ¶ 5; *see also* R. 118-119 ¶¶ 1-2; Rule

“justified expectation” that he could rely on any “prior agreements and understandings of the Parties” or any other “representations ... except as specifically set forth” in the parties’ written Agreement. It also forecloses any “supplement, modification, amendment, waiver or termination of this Agreement ... unless executed in writing and signed by the Parties hereto.”⁹ Thus, to the extent Marin relies on this Court’s opinion in *Brown v. Moore*, 973 P.2d 950 (Utah 1998), to extend the covenant of good faith and fair dealing to include “express or implied obligations” or “representations” (Pet. Br. 17-19, *citing id.* at 954-55), his signature directly below this clear integration clause forecloses that in his case.

In sum, although Marin asserts he is relying on the covenant of good faith and fair dealing, he has provided no evidence of any course of dealing on which he could justifiably rely. The clear integration clause precludes any justified expectation by Marin that a prior oral agreement or representation was or could be a part of the parties’ final signed Agreement. Since Marin has never disputed or even addressed the integration clause, the court of appeals’ conclusion that the parties’ Agreement was integrated was not clearly erroneous. Because Marin’s affidavit seeks to add a new term to an expressly integrated written agreement, the court of appeals correctly concluded that the parol evidence rule and the covenant of good faith and fair dealing preclude its admission for

7(c)(3)(A) and (B), Utah R. Civ. P. (R. 6 ¶ 18 (emphasis added); R. 101 ¶ 3; R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(B), Utah R. Civ. P.; *cf.* R. 21 ¶¶ 10-11, 14; R. 63 ¶ 2 and 62 ¶ 5).

⁹ Thus, any statements in Marin’s affidavit about his purported conversations with Young Living regarding “marketing tools” after he signed the Agreement could not supplement, modify, or amend its terms.

that purpose. *Tangren Family Trust v. Tangren*, 2008 UT 20 ¶ 11, 182 P.3d 326, 330 (Utah 2008) (the parol evidence rule “operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract”); *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101 ¶ 45, 104 P.3d 1226, 1239 (Utah 2004) (“While a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree”); *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1048 (Utah App. 1994) (“the covenant of good faith and fair dealing cannot be construed to establish new, independent rights or duties not agreed upon by the parties”), citing *Brehany v. Nordstrom, Inc.*, 812 P.2d 48, 55 (Utah 1991); accord *Brown v. Moore*, 973 P.2d 950, 955 (“a contrary holding would ‘establish new, independent rights or duties not agreed upon by the parties’”).

4. The Proper Legal Framework for Analysis.¹⁰

This case marks an intersection between a clear integration clause, the parol evidence rule, the covenant of good faith and fair dealing, and summary judgment. Marin seeks to extend the covenant of good faith and fair dealing so that extrinsic evidence may be permitted to add an oral term to an expressly integrated written agreement, or, at a minimum, to create a genuine issue of material fact in summary judgment.

¹⁰ For Young Living’s analysis of whether the trial court properly applied this proper framework, see Young Living’s brief at the court of appeals at 15-19.

Like the court of appeals, this Court could simply hold that, since it is undisputed that the parties' Agreement contained a clear integration clause, Marin's affidavit is not admissible to add new terms to the parties' expressly integrated written agreement. But this Court's grant of certiorari review also creates an opportunity for the Court to reaffirm its prior rulings on the following principles:

a. Contract interpretation is a question of law: "[I]nterpretation of a contract is a question of law." *Dennis Dillon Oldsmobile, GMC v. Zdunich*, 668 P.2d 557, 561 (Utah 1983), citing *Morris v. Mountain States Tel. & Tel. Co.*, 658 P.2d 1199, 1200 (Utah 1983).

b. The threshold question: Is the agreement integrated? Before a trial court can consider evidence outside the parties' written agreement, it must consider whether that agreement is integrated. *Tangren Family Trust v. Tangren*, 2008 UT 20 ¶ 11, 182 P.3d 326, 330 (Utah 2008) ("[f]irst, the court must determine whether the agreement is integrated"), citing *Hall v. Process Instruments & Control*, 890 P.2d 1024, 1026-27 (Utah 1995) (this Court affirmed where trial judge excluded parol evidence offered to add terms to a written agreement that was complete on its face), citing *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985).

"To determine whether a writing is an integration, a court must determine whether the parties adopted the writing 'as the *final and complete* expression of their bargain.'" *Id.*, quoting *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 501 P.2d 266, 270 (Utah 1972) (emphasis added by *id.*). "[W]hen parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of

fraud, that the writing contains the whole of the agreement between the parties.” *Id.*

Integration clauses

“are routinely incorporated in agreements in order to signal to the courts that the parties agree that the contract is to be considered completely integrated. A completely integrated agreement must be interpreted on its face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document.”

Id., quoting *Ford v. Am. Express Fin. Advisors, Inc.*, 2004 UT 70, ¶ 28, 98 P.3d 15, 25 (Utah 2004).

c. Whether a contract is integrated is a preliminary question of fact for determination by the court that may be resolved in summary judgment: “Whether a contract is integrated is a question of fact reviewed for clear error.” *Id.* ¶ 10 at 229 (*citing State v. Levin*, 2006 UT 50, ¶ 20, 144 P.3d 1096, 1103 (Utah 2006) (“an appellate court reviews the trial court’s findings of fact for clear error”); *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 501 P.2d 266, 270 (Utah 1972) (“the court must determine as a question of fact whether the parties did in fact adopt a particular writing or writings as the final and complete expression of their bargain”); *cf. AGI v. First Affiliated Securities*, 912 F.2d 1238, 1245 (10th Cir. 1990) (summary judgment affirmed where, under Utah law, trial judge refused to consider parol evidence of purported additional oral terms of expressly integrated written agreement).

d. “If a contract is integrated, parol evidence is admissible only to clarify ambiguous terms.” *Tangren*, 2008 UT 20, ¶ 11, 182 P.3d at 330. Marin has never claimed that the Agreement was ambiguous.

e. “[W]hether a contract is ambiguous is a question of law reviewed for correctness.” *Id.*, ¶ 10 at 229.

f. “If a contract is integrated, parol evidence ... is ‘not admissible to vary or contradict the clear and unambiguous terms of the contract.’” *Id.*, ¶ 11 at 330, quoting *Hall v. Process Instruments & Control*, 890 P.2d 1024, 1026 (Utah 1995) (citations omitted). This holding is dispositive here.

g. “[I]n the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of integration.” *Id.*, ¶ 17 at 332. This holding may be limited to the unique facts of the *Tangren* case: i.e., where the parties offered extrinsic evidence of an oral agreement that the written agreement was invalid or subject to a condition precedent. *Id.*, ¶ 16 at 331. See discussion under sections 5 and 6 below.

h. “Extrinsic evidence is appropriately considered, even in the face of a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality.” *Id.*, ¶ 15 at 330-31, citing *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985); Restatement (Second) of Contracts § 214 cmt. c. None of these apply here since Marin has limited his claim to the implied covenant of good faith and fair dealing. See R. 63 ¶ 2 and 62 ¶ 5; see also R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(A) and (B), Utah R. Civ. P. (R. 6 ¶ 18 (emphasis added); R. 101 ¶ 3; R. 118-119 ¶¶ 1-2; Rule 7(c)(3)(B), Utah R. Civ. P.; cf. R. 21 ¶¶ 10-11, 14; R. 63 ¶ 2 and 62 ¶ 5).

i. The covenant of good faith and fair dealing cannot be construed to add new terms to a parties' agreement. “While a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante.” *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.2d 1226, 1239 (Utah 2004); “[T]he covenant of good faith and fair dealing cannot be construed to establish new, independent rights or duties not agreed upon by the parties.” *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1048 (Utah App. 1994), *citing Brehany v. Nordstrom, Inc.*, 812 P.2d 48, 55 (Utah 1991); *accord Brown*, 973 P.2d at 955 (“a contrary holding would ‘establish new, independent rights or duties not agreed upon by the parties’”). In tandem with the parol evidence rule, this holding is dispositive here.

j. “[T]he degree to which a party to a contract may invoke the protections of the covenant [of good faith and fair dealing] turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms.” *Smith v. Grand Canyon Expeditions*, 2003 UT 57, ¶ 20, 84 P.3d 1154, 1159-60 (Utah 2003), *citing Malibu Inv. Co. v. Sparks*, 2000 UT 30, ¶ 19, 996 P.2d 1043, 1050 (Utah 2000).

5. Harmonizing *Oakwood*, *Brown*, and *Tangren*

As noted in the prior section, this case marks an intersection between a clear integration clause, the parol evidence rule, the covenant of good faith and fair dealing, and summary judgment. Because of this, none of the three cases relied on primarily by

the court of appeals, by Marin, and by Young Living is “on all fours” with the current case.

Thus, this Court’s grant of certiorari review creates an opportunity for the Court to explicitly harmonize these three cases based on the circumstances presented in this case. After a review of each of these cases, we will suggest specific proposed holdings the Court could render to harmonize them here.

a. Court of Appeals: *Oakwood Village, LLC v. Albertsons, Inc.* The court of appeals relied primarily on *Oakwood Village, LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226, 1239 (Utah 2004), in upholding the trial court’s summary judgment ruling in Young Living’s favor.

Oakwood involved:

- a Rule 12(b)(6) motion to dismiss (not summary judgment as here);
- the *affirmative* use of the implied covenant of good faith and fair dealing in a claim for its breach (unlike Marin’s use here as a claimed *defense* to breach of contract);
- no claim of fraud or ambiguity (as here: Marin has limited his claims to the implied covenant of good faith and fair dealing);
- impliedly (although not explicitly) the parol evidence rule; and,
- although the Court found the lease in *Oakwood* to be “a complete and unambiguous agreement between competent commercial parties,” it did not involve a “clear integration clause” in the contract at issue (unlike here; *cf. Tangren*; see also **Table 1** on page 28, *infra*).

Oakwood Village, LLC sued Albertsons, Inc. for breach of the implied covenant of good faith and fair dealing for continuing to pay for but not occupy leased premises, and opening a competing store. *Oakwood*, ¶ 6 at 1230 and ¶ 42 at 1239. The trial court dismissed the claim under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and this Court affirmed.

In affirming, this Court noted that “Oakwood’s complaint does not contain averments regarding the parties’ course of dealings or conduct, focusing only on the contractual language.” *Id.*, ¶ 43 at 1240.

The Court also noted that it determines the “purpose, intentions, and expectations” of the parties by considering “the contract language and the course of dealings between and conduct of the parties.” *Id.*, quoting *St. Benedict’s Dev. Co., v. St. Benedict’s Hospital*, 811 P.2d 194, 200 (Utah 1991).

The Court concluded that “Oakwood’s construction of the obligation to act in good faith and deal fairly would violate other broader principles of contract interpretation” (*Id.*, ¶ 44 at 1240), apparently referring to the parol evidence rule. Then the Court made the statement quoted in part and relied on by the court of appeals in affirming here:

While a covenant of good faith and fair dealing inheres in almost every contract, some general principles limit the scope of the covenant. ... First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). ... [In addition], we will not use this covenant to achieve an outcome in harmony with the court’s sense of justice but inconsistent with the express terms of the applicable contract. See *Dalton v. Jerico Constr. Co.*, 642 P.2d 748, 750 (Utah 1982).

Id., ¶ 45 at 1249. In support of its holding, the Court noted, “[i]t is not our role to intervene now, construing the contract’s unambiguous terms to mean something different from what the parties intended them to mean at the outset.” *Id.*, ¶ 53 at 1241. The Court also pointed out,

Oakwood has stated that “[f]airness in business dealings should be a concern to this Court.” It is precisely this concern for fairness, however, which bars us from reading into the lease an obligation that Oakwood failed to secure during contract negotiations. The duty Oakwood now seeks to impose on Albertsons is simply not one for which the parties bargained.

Id., ¶ 55 at 1242. The court of appeals cited *Oakwood* and found it dispositive here. Young Living believes the last two sentences quoted above have particular application to Marin’s claims.

b. Defendant-Petitioner Marin: *Brown v. Moore*. In his brief before this Court, Marin relies primarily on *Brown v. Moore*, 973 P.2d 950 (Utah 1998), as suggesting that:

(1) a cause of action for breach of the implied covenant of good faith and fair dealing may arise from obligations or representations, express or implied, which are not found in the language of the contract itself; and (2) that a cause of action based upon obligations or representations not found in the language of the contract does not necessarily “establish new, independent rights or duties not agreed upon by the parties.”

(Pet. Br. at 19).¹¹

¹¹ Significantly, none of the three “course of dealing” cases cited by Marin in support of his argument about implied terms (Pet. Br. 19) contained an integration clause. See *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998); *St. Benedicts Dev. v. St. Benedicts Hosp.*, 811 P.2d 194, 200 (Utah 2001); *Andalex Resources, Inc. v Myers*, 871 P.2d 1041, 1048 (Utah App. 1994); see also *Tangren*, n.20 at 331.

Brown involved:

- summary judgment (as here);
- the *offensive* use of the implied covenant of good faith and fair dealing in a claim for breach of contract (unlike Marin’s use here as a claimed *defense* to breach of contract);
- no claim of fraud or ambiguity (as here: Marin has limited his claims to the implied covenant of good faith and fair dealing);
- impliedly (although not explicitly) the parol evidence rule; but,
- it did not involve a “clear integration clause” in the contract at issue (unlike here; *see* n.11, *supra* at 22; *see also* **Table 1** on page 28, *infra*).

The plaintiffs in *Brown* sued the defendant for breach of the implied covenant of good faith and fair dealing in its contract with plaintiffs when it took possession of a savings and loan institution they owned. *Brown*, 973 P.2d at 951. Defendant filed a motion for summary judgment which the trial court granted. Plaintiffs appealed, arguing that the trial court erred in awarding summary judgment based on its assessment of breach of the express and implied contractual obligations. This Court affirmed. It noted that,

[Defendant] emphasizes that plaintiffs cannot identify any representation or promise on the part of [defendant] which would support a finding of breach of the covenant of good faith and fair dealing, noting the limited contacts plaintiffs had with [defendant’s] representatives prior to executing the purchase agreement.

Id., at 954. The Court also indicated that, “[i]n determining whether a party has breached the covenant of good faith and fair dealing,

we are not limited to an examination of the express contractual provisions; we will also consider the course of dealings between the parties. [Citations omitted]. However, we will not interpret the implied covenant of good faith and fair dealing to make a better contract for the parties than they made for themselves. [Citations omitted]. Nor will we construe the covenant “to establish new, independent rights or duties not agreed upon by the parties. *Brehany*, 812 P.2d at 55.

Id. The Court then stated what Marin has quoted in his brief before this Court:

Thus, if plaintiffs are to defeat summary judgment, the course of dealings between the parties must disclose some other obligation, express or implied, on the part of [defendant] which could give rise to a breach of the covenant of good faith and fair dealing.

Id. The Court found that plaintiffs could show no express representation by defendant, and quoted an opinion letter issued in conjunction with the execution of the agreement that disclaimed any such representations. *Id.*, at 954-55.

“Thus,” the Court concluded, “any assumption by plaintiffs that the [defendant] had an obligation [plaintiffs claimed] ... was not reasonable” and the lack of “express or implied obligations of or representations by” defendants was fatal to plaintiffs claim “of a breach of the covenant of good faith and fair dealing. A contrary holding,” the Court reasoned, “would ‘establish new, independent rights or duties not agreed upon by the parties.’” *Id.*, at 955, *quoting Brehany*, 812 P.2d at 55.

While it goes the farthest of any Utah case in suggesting that the covenant of good faith and fair dealing could extend to “implied obligations” or “representations” by one of the parties, *Brown*’s holding is unhelpful to Marin, because there was a clear integration clause in the Agreement Marin signed, specifically excluding implied obligations or “representations” from the parties’ written Agreement. Indeed, without a clear

integration clause in *Brown*, the Court appeared to simply follow its precedent in considering “all relevant evidence” in determining whether the parties’ agreement was integrated, and, if not, what terms the parties intended. *Hall*, 890 P.2d at 1026-27 (to resolve the question of integration, any relevant evidence is admissible).¹²

Even though *Brown* seems to go the farthest in support of Marin’s argument, it stops short. In any event, the dispositive distinction between *Brown* and this case is the clear integration clause Marin signed.

c. Plaintiff-Respondent Young Living: *Tangren Family Trust v. Tangren*. In its brief before the court of appeals, and before this Court, Young Living relies primarily on *Tangren Family Trust v. Tangren*, 2008 UT 20 ¶ 11, 182 P.3d 326, 330 (Utah 2008), in support of its position that the parol evidence rule precludes admission of Marin’s affidavit.

Tangren involved:

- a bench trial (unlike summary judgment here);
- the parol evidence rule (as here);
- a “clear integration clause” in the contract at issue (as here); but
- it did not involve a claim related to the breach of the covenant of good faith and fair dealing (*cf. Oakwood and Brown*); and

¹² In *Tangren*, this Court disavowed *Hall* to the extent it was read to “suggest that extrinsic evidence of a separate oral agreement *is* admissible where the contract contains a clear integration clause.” *Tangren*, n.20 at 331 (emphasis in original).

- it did not involve a claim of fraud or ambiguity (as here: Marin has limited his claims to the implied covenant of good faith and fair dealing) (see also **Table 1** on page 28, *infra*).

In *Tangren*, the trustee of the Tangren Family Trust prepared a 99-year lease for his son to protect his interest in a ranch property. The lease included a clear integration clause: “*Entire Agreement*: This Lease contains the entire understanding between the parties with respect to its subject-matter, the Property and all aspects of the relationship between Lessee and Lessor.”

The relationship between father and son later deteriorated, the son recorded the lease, and the father demanded payment which the son tendered by way of checks the father never cashed. Ultimately, the father filed suit for breach of lease and damages for removal of property. During the bench trial, the father amended his complaint to allege breach, but also that the lease “did not form a valid contract between the parties because the conditions upon which it was entered into were never met.” The son counterclaimed. *Id.*, ¶¶ 2-6 at 327-28.

Both father and son testified that the lease was not intended to be valid between them, but to protect the son’s interest from his siblings. The trial court agreed, determined the son had no obligation to pay rent and ordered the son off the ranch. The son appealed. *Id.*, ¶¶ 7-8 at 328-29.

The court of appeals reversed, explaining that the trial court properly considered extrinsic evidence in assessing whether the lease was an integration, but that it erred in relying on the father’s testimony regarding his intent in creating the lease in the face of a

clear and unambiguous integration clause in the lease itself. The court of appeals found that the parties entered into a “valid, integrated, and unambiguous lease agreement” and remanded for the trial court to determine whether the son breached the lease.

This Court granted certiorari to determine whether the court of appeals erred in its assessment of the parol evidence rule. *Id.*, ¶ 9 at 329.

The Court outlined the well-settled principles of the parol evidence rule and the two-step analysis regarding integration and ambiguity: first, the court must determine whether the agreement is integrated (a question of fact); and, second, the court must determine whether the language of the agreement is ambiguous (a question of law). If the court finds an agreement is integrated and its terms are unambiguous, parol evidence is inadmissible to vary or add to the terms of the agreement. *Id.*, ¶¶ 10-13 at 329-30.

In *Tangren*, the Court found that the plaintiff’s argument “amounts to a contention that a separate oral understanding overrides the written Lease’s clear integration clause. We reject this argument.” *Id.*, ¶ 14 at 330. The Court further noted,

To argue that the Lease is not the complete agreement of the parties is to argue in direct contradiction to the clear integration clause. Thus, we will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause. To the extent any of our prior cases provide otherwise, we overrule those cases.

Id., ¶ 16 at 331. The Court likewise concluded that the court of appeals’ consideration of extrinsic evidence about a separate oral agreement or condition precedent related to the agreement was improper since the lease contained “a clear integration clause”: “We conclude that the Lease is integrated and that its terms are unambiguous. Thus, the parol

evidence rule bars the admission of all extrinsic evidence regarding the Lease.” *Id.*, ¶ 19 at 332.

Since the implied covenant of good faith and fair dealing was not at issue in *Tangren*, the Court did not explicitly extend its holdings to apply where a claimed breach of that covenant is at issue.

See **Table 1** below for a summary comparison of the issues in these cases with the issues in this case:

Table 1: Summary of Issues: *Oakwood*, *Brown*, and *Tangren* – and this case

	OAKWOOD	BROWN	TANGREN	YL v. Marin
ISSUES/LAW	Relied on by court of appeals	Relied on by Marin	Relied on by Young Living	<i>(This case)</i>
<i>Offensive</i> Use of Covenant of Good Faith and Fair Dealing	YES	YES	NO	NO
<i>Defensive</i> Use of Covenant of Good Faith and Fair Dealing	NO	NO	NO	YES
“Clear Integration Clause”	NO	NO	YES	YES
Claim of Fraud	NO	NO	NO	NO
Claim of Ambiguity	NO	NO	NO	NO
Parol Evidence Rule	<i>(Implied)</i>	<i>(Implied)</i>	YES	YES
Summary Judgment	NO	NO	NO	YES

6. Proposed holdings harmonizing *Oakwood*, *Brown*, and *Tangren*

Young Living suggests this Court can harmonize in this case the holdings of these three cases, to wit:

a. Like all contract terms, integration depends on the contracting parties' intent. The law favors writings to most clearly express the contracting parties' intent that the writing embodies their whole agreement. Thus, if a written agreement contains a clear integration clause, no extrinsic evidence is to be considered nor is it admissible on the issue of integration, or to add to or vary terms of the written agreement. *See Tangren*, and **Tables 2 and 3** on pages 31 and 32, *infra*.

b. In the absence of a clear integration clause, the trial court considers all relevant evidence to determine whether an agreement is integrated. If it is not integrated, the trial court may consider extrinsic evidence to determine the terms of the parties' agreement. *See Tangren and Hall*, and **Table 2** on page 31, *infra*.

c. Even where there is a clear integration clause or the trial court finds based on all relevant evidence that an agreement is integrated, extrinsic evidence is nevertheless admissible to show the contract is void because it is a joke, sham, forgery, or is lacking in consideration, or to show the contract is voidable because of fraud, duress, mistake, or illegality. *See Tangren and Brown*, and **Tables 2 and 3** on pages 31 and 32, *infra*.

d. Whereas extrinsic evidence may be admitted under the parol evidence rule only to explain or clarify ambiguous terms of an integrated agreement, and extrinsic evidence may also be admitted under a claim of the breach of the implied covenant of good faith and fair dealing only to show one party prevented another party's performance or that

party's receipt of the benefits the contract, in neither case may extrinsic evidence ever be admitted to add to or vary terms of an unambiguous, integrated written agreement. *See Oakwood, Brown, and Tangren, and Table 3 on page 32, infra.*

////

////

////

////

////

////

////

////

////

////

////

////

////

////

////

////

////

////

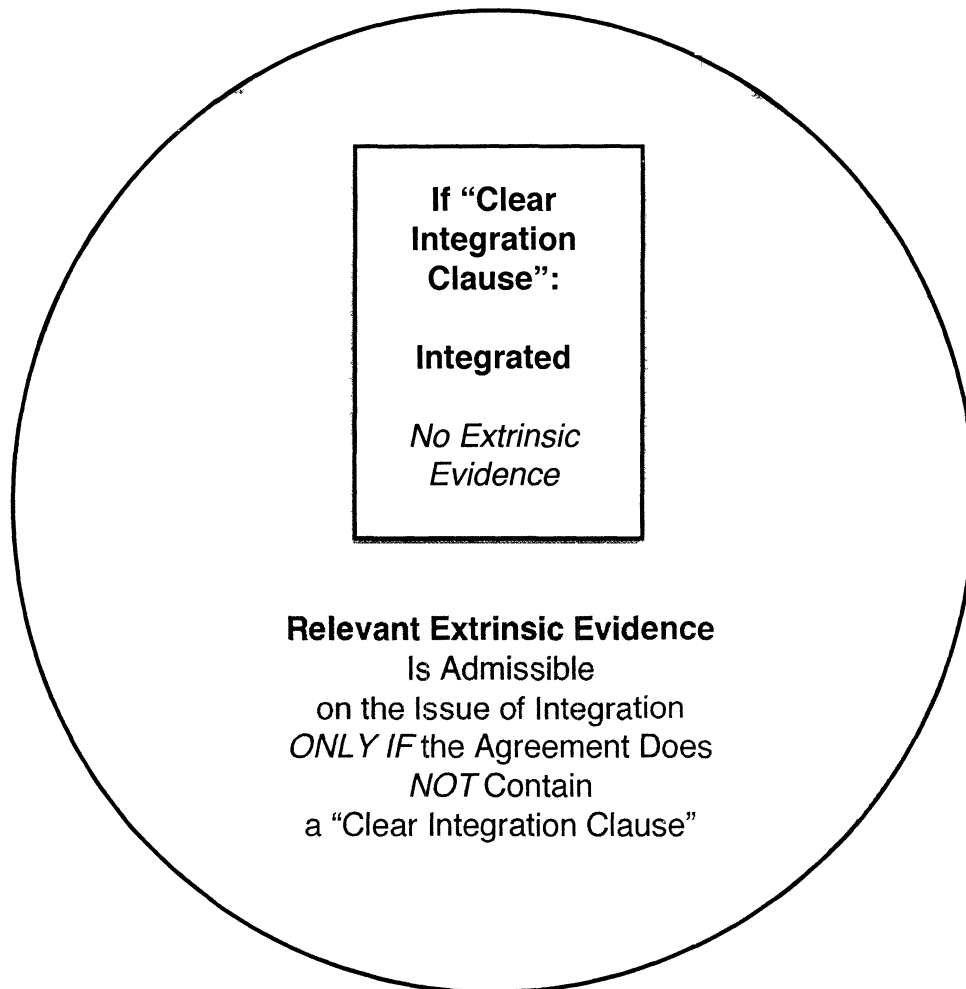
////

Table 2: Integration

Clear Integration Clause v. Relevant Extrinsic Evidence

General Rule:

**Where an agreement contains a clear integration clause,
extrinsic evidence may not be admitted on the issue of integration**



Exceptions:

Even where there is a “Clear Integration Clause” *OR* an agreement is otherwise found to be integrated, extrinsic evidence may be used to show a contract is *VOID* (as a joke, sham, fraud, or forgery, or for lack of consideration) *OR VOIDABLE* (for fraud, duress, mistake, or illegality)

Sources: *Tangren*, ¶ 17 at 332 (circle & rectangle); *Hall*, 890 P.2d at 1026-27 (circle)

Table 3: Integration

Parol Evidence Rule and the Covenant of Good Faith & Fair Dealing

General Rule:

**Where parties have an integrated agreement,
extrinsic evidence may not be used to add to or vary its terms**



Exceptions:

Even where there is a "Clear Integration Clause" *OR* an agreement is otherwise found to be integrated, extrinsic evidence may be used to show a contract is *VOID* (as a joke, sham, fraud, or forgery, or for lack of consideration) *OR VOIDABLE* (for fraud, duress, mistake, or illegality)

Sources: *Oakwood*, ¶ 45 at 1226 (circle & main rectangle); *Brown*, 973 P.2d at 954 (circle & main rectangle); *Tangren*, ¶¶ 11 & 15 at 330, 331 (both rectangles)

e. Evidence admitted under the parol evidence rule typically, although not always, involves the contracting parties' words or representations, while course of dealing and conduct evidence admitted on the issue of a breach of the implied covenant of good faith and fair dealing typically, although not always, involves the contracting parties' actions. The contracting parties words and actions (i.e., representations outside the written contract, course of dealing, and conduct) all fall under the definition of "extrinsic evidence." Where parties have an integrated agreement, no extrinsic evidence may be used to add to or alter its terms. *Oakwood, Brown and Tangren*, and **Table 3** on page 32, *supra*.

In harmonizing its prior holdings, this Court could also explicitly adopt the well-reasoned holding in *United States Construction Corporation v. Harbor Bay Estates, Ltd.*, 876 N.E.2d 637, ¶ 42 at 643 (Ohio 2007) (copy at Addendum 5), to wit: **"The implied covenant of good faith and fair dealing cannot be used to make an end run around the parol evidence rule."** *Id.*, quoting *McNulty v. PLS Acquisition Corp.*, 8th Dist. No. 79025, 2002-Ohio-7220, 2002 WL 31875200, ¶ 24 (Emphasis added).

7. Conclusion

Based on the clear integration clause in the parties' Agreement, the court of appeals correctly concluded under both the implied covenant of good faith and fair dealing and the parol evidence rule that Marin's affidavit was not admissible to add a term to the parties' Agreement. Since the court of appeals' conclusion was correct, this Court should affirm and award Young Living its fees and costs.

B. MARIN FAILED TO PRESERVE THE ISSUE OF ATTORNEYS' FEES FOR APPEAL

This Court recently instructed:

[t]o preserve an issue for appeal, the appellant must have raised “a *timely* and specific objection” before the trial court. We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review.

H.U.F. v. W.P.W. ___ P.3d ___, 2009, WL 304711 (Utah 2009) (*quoting State v. Low*, 192 P.3d 867 (Utah 2008) (emphasis added) (copy at Addendum 1).

In this case, Marin did not raise a timely objection to Young Living’s Proposed Judgment or to Young Living’s Affidavit of Attorneys’ Fees and Costs.

Pursuant to Utah Rules of Civil Procedure, Rule 7(f)(2), “[o]bjections to the proposed order¹³ shall be filed within five days after service.” Here, Young Living filed and served its Proposed Final Judgment and Affidavit of Attorneys’ Fees on 27 May 2008. (R. 505, 492). Following this Marin was allowed five (5) days, plus three (3) days for service by mail (Rule 6(e)), by which to file any objection to the Proposed Final Judgment including the Affidavit of Attorneys’ Fees and Costs, making any objection due on 6 June 2008. Marin did not file his objection with the trial court until 11 June 2008. (R. 499).

Thus, Marin did not timely object to Young Living’s Proposed Final Judgment and Affidavit of Attorney’s Fees and Costs. By failing to do so, Marin failed to preserve the issue of the reasonableness of Young Living’s attorney’s fees for appeal.

¹³ Utah Rules of Civil Procedure, Rule 54 defines “Judgment” as used in the rules as a decree and any order from which an appeal lies.

In any event, Young Living agrees that it is not entitled to recover attorney fees related to its tort and other non-contract claims, and in connection with issues on which it did not prevail. Thus, if Young Living prevails in this appeal, it will submit a revised affidavit of attorney fees to the trial court excluding \$6,754.50 for work in connection with the additional claims in its Complaint and issues on which it did not prevail below. If Young Living does not prevail on this appeal, the attorney fees issue will be moot since the case will be remanded for trial, and since Marin did not appeal the trial court's denial of his "counter-motion" for summary judgment.

In response to some of Marin's additional arguments related to fees:

1. **"No findings of fact as to attorney fees."** The trial court made no findings of fact as to the attorney fees award because Marin's objection was untimely and the award was therefore uncontested.

2. **"Simple breach of contract case."** Because Marin evaded service, Young Living expended additional fees and costs. It ultimately obtained an order for service by publication (R. 36-48).

Because of the issues raised by Marin in his affidavit and his "countermotion" for summary judgment (the denial of which Marin has not appealed), and without the benefit of the *Tangren* case which was decided later, Young Living sought for and obtained Marin's approval of extensions to respond which it used to do:

- detailed interviews of those who might have made the central representation Marin claimed in his affidavit (Marin's affidavit failed to provide a time or place of the representation, or the identity of the person making the purported representation);

- a review of email communications between the parties (R. 171-287, 465-487);
- a review of a companion agreement of Marin's upline supervisor related to the production of "marketing tools" (R. 180-232); and
- research regarding Marin's experience in developing "marketing tools" (R. 184-203, 238-252, 256-272).

Pre-*Tangren*, Young Living was prudent in fulfilling its obligation under *Hall* to provide "all relevant" evidence to the trial court on the issue of integration. It is thus disingenuous of Marin to claim Young Living's inefficiency when his assertions were the cause of the additional work occasioned by his affidavit and "countermotion" for summary judgment, and when he granted the extensions requested.

VIII. CONCLUSION

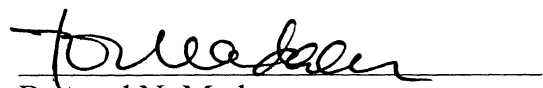
The court of appeals correctly ruled that Marin's affidavit could not be admitted to add an oral term to the parties' expressly integrated written agreement.

Marin did not preserve the attorney's fees and costs issues for appeal.

This Court should affirm the court of appeals and award Young Living its costs and fees, including on appeal.

Respectfully submitted this 16th day of April, 2010.

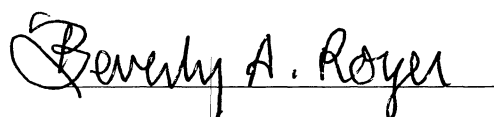
FILLMORE SPENCER LLC


 Barnard N. Madsen
 Attorneys for Respondent Young Living
 Essential Oils, LC

CERTIFICATE OF SERVICE

I certify that on the 19th day of April, 2010, I caused two true and correct copies of the foregoing **BRIEF OF RESPONDENT** to be sent by first-class mail, prepaid, to the following:

Scott B. Mitchell
SCOTT B. MITCHELL, PC
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121
:Attorney for Petitioner Carlos Marin



ADDENDA

ADDENDUM 1

--- P.3d ---

--- P.3d ---, 2009 WL 304711 (Utah), 623 Utah Adv. Rep. 14, 2009 UT 10

(Cite as: 2009 WL 304711 (Utah))

Supreme Court of Utah.

H.U.F. and G.F., Petitioners and Appellees,

v.

W.P.W., Respondent and Appellant.

No. 20070610.

Feb. 10, 2009.

Background: Putative father filed motion to intervene in adoption proceeding. Following a hearing, the Fourth District, Provo Department, Lynn W. Davis, J., granted adoptive parent's motions to dismiss and strike putative father's motion to intervene, and putative father appealed. The Court of Appeals certified the case for immediate transfer.

Holdings: The Supreme Court, Durrant, Associate C.J., held that:

- (1) putative father's arguments on appeal were not moot;
- (2) putative father did not comply with Arizona requirements to preserve his parental rights, as required in order to qualify for exception to Utah statute that denied putative fathers who did not register with Office of Vital Statistics the right to contest adoptions;
- (3) evidence was sufficient to establish that putative father had reason to believe that mother had moved to Utah and thus was required to register with Office of Vital Statistics in order to preserve his parental rights and intervene in the adoption proceeding;
- (4) Arizona paternity order was entitled to full faith and credit; but
- (5) error of trial court in concluding that Arizona order was not entitled to full faith and credit was harmless, as such order had no bearing on putative father's right to challenge adoption;
- (6) trial court could make findings of fact without providing putative father with an evidentiary hearing; and
- (7) putative father's appeal was not frivolous.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚡842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In General. Most

Cited Cases

Supreme Court review a district court's interpretation of a statute for correctness.

[2] Appeal and Error 30 ⚡1008.1(5)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1008 Conclusiveness in General

30k1008.1 In General

30k1008.1(5) k. Clearly Erroneous Findings. Most Cited Cases
Supreme Court reviews a district court's findings of fact under a clearly erroneous standard.

[3] Appeal and Error 30 ⚡842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In General. Most

Cited Cases

Supreme Court reviews a district court's ruling regarding a statute's constitutionality for correctness.

[4] Appeal and Error 30 ⚡843(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k843 Matters Not Necessary to Decision on Review

30k843(1) k. In General. Most

Cited Cases

An argument is moot on appeal if the requested judicial relief cannot affect the rights of the litigants.

[5] Adoption 17 ⚡15

17 Adoption

17k9 Judicial Proceedings

17k15 k. Review. Most Cited Cases

Putative father's arguments on appeal of trial court orders regarding his attempt to intervene in adoption proceeding were not moot on the ground that he only addressed trial court's order granting adoptive parents' motion to dismiss putative father's motion to intervene and did not address trial court's order granting adoptive parent's motion to strike motion to intervene based on putative father's false assertions, where putative father in his opening brief challenged trial court's finding that putative father had knowledge that birth mother was in Utah, and, though putative father did not explicitly state he was challenging the motion to strike, the challenge was substantially briefed.

[6] Adoption 17 ⚡15

17 Adoption

17k9 Judicial Proceedings

17k15 k. Review. Most Cited Cases

Putative father did not preserve for appeal a due process challenge and equal protection challenge, in his appeal of trial court order dismissing and striking his motion to intervene in adoption proceeding, where putative father's motion to intervene in the trial court did not raise a due process or equal protection challenge, and trial court's rulings did not

consider a due process or equal protection challenge. U.S.C.A. Const.Amend. 14; Rules App.Proc., Rule 24(a).

[7] Appeal and Error 30 ⚡169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k169 k. Necessity of Presentation in General. Most Cited Cases

Supreme Court will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review. Rules App.Proc., Rule 24(a).

[8] Adoption 17 ⚡7.2(3)

17 Adoption

17k7 Consent of Parties

17k7.2 Natural Parents, Necessity of Consent in General

17k7.2(3) k. Illegitimate Children. Most Cited Cases

Putative father, who resided in Arizona where mother also resided and failed to register with Utah Office of Vital Statistics, failed to comply with the most stringent and complete Arizona statutory requirements to preserve his parental rights, as required in order to qualify for exception to Utah statute that denied putative fathers who did not register with Office of Vital Statistics the right to contest adoptions; Arizona statute required a putative father to initiate a paternity action within 30 days of receiving notice that a birth mother intended to give a child up for adoption, birth mother served putative father with notice stating that if he wished to assert his parental rights he "must" start a paternity action within 30 days, notice putative father received was not ambiguous, and putative father did not start his paternity action in Arizona within 30 days of receipt of the notice. U.C.A.1953, 78-30-4.14 (Repealed); A.R.S. § 8-106(G).

[9] Statutes 361 ⚡188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

When interpreting a statute, courts look first to the statute's plain language to determine its meaning.

[10] Statutes 361 ⚡205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k205 k. In General. Most Cited

Cases

Statutes 361 ⚡208

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k208 k. Context and Related

Clauses. Most Cited Cases

Statutes 361 ⚡223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to

Other Statutes

361k223.2 Statutes Relating to the

Same Subject Matter in General

361k223.2(.5) k. In General. Most

Cited Cases

When interpreting a statute, courts read the plain language of a statute as a whole and interpret its provisions in harmony with other provisions in the same statute and with other statutes under the same and related chapters.

[11] Statutes 361 ⚡181(2)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k. Effect and Con-

sequences. Most Cited Cases

Statutes 361 ⚡206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k206 k. Giving Effect to Entire

Statute. Most Cited Cases

When interpreting a statute, courts seek an interpretation that renders all parts of a statute relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical or absurd.

[12] Appeal and Error 30 ⚡1008.1(5)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and

Findings

30XVI(1)3 Findings of Court

30k1008 Conclusiveness in General

30k1008.1 In General

30k1008.1(5) k. Clearly Erroneous

Findings. Most Cited Cases

Supreme Court will overturn a district court's findings of fact only if they are clearly erroneous.

[13] Adoption 17 ⚡7.8(4)

17 Adoption

17k7 Consent of Parties

17k7.8 Evidence

17k7.8(3) Weight and Sufficiency

17k7.8(4) k. Necessity of Consent in

General. Most Cited Cases

Adoption 17 ⚡11

--- P.3d ----, 2009 WL 304711 (Utah), 623 Utah Adv. Rep. 14, 2009 UT 10
(Cite as: 2009 WL 304711 (Utah))

17 Adoption

17k9 Judicial Proceedings

17k11 k. Petition and Parties. Most Cited Cases

Evidence was sufficient to establish, at hearing on adoptive parents' motions to dismiss and strike putative father's motion to intervene in Utah adoption proceeding, that putative father, who resided in Arizona where birth mother also resided, had reason to know that mother moved to Utah, and thus that putative father was required to register with Utah Office of Vital Statistics in order to preserve his parental rights and intervene in the adoption proceeding; though mother sent e-mail to putative father one week after she obtained protective order against him in Arizona denying that she moved to Utah, father in open court at hearing on mother's request for protective order testified that she told him she moved to Utah. U.C.A.1953. 78-30-4.14 (Repealed).

[14] Children Out-Of-Wedlock 76H ⚡64

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk64 k. In General. Most Cited Cases

Children Out-Of-Wedlock 76H ⚡68

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk68 k. Operation and Effect. Most Cited Cases

Arizona paternity order, finding that putative father was the biological father, complied with Arizona requirements for a judgment, for purposes of determining whether the order was entitled to full faith and credit when putative father sought to intervene in Utah adoption proceeding; though order was not executed by a judge and copy provided to Utah court was not certified, Arizona law only required that the judgment be in writing and signed by a judge or a court commissioner duly authorized to do so, and paternity order was in writing and

signed by a deputy clerk. U.S.C.A. Const. Art. 4, § 1; 16 A.R.S. Rules Civ.Proc., Rule 58(a).

[15] Judgment 228 ⚡815

228 Judgment

228XVII Foreign Judgments

228k814 Judgments of State Courts

228k815 k. Adjudications Operative in Other States. Most Cited Cases

As to matters of jurisdiction, a judgment is entitled to full faith and credit if the same issue as to jurisdiction was raised in the foreign court and adjudicated therein. U.S.C.A. Const. Art. 4, § 1.

[16] Children Out-Of-Wedlock 76H ⚡68

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk68 k. Operation and Effect. Most Cited Cases

Arizona order of paternity regarding putative father was entitled to full faith and credit, when putative father sought to intervene in Utah adoption proceeding, though the Arizona court determined that it lacked jurisdiction to determine custody as the child did not reside in Arizona and had not resided in Arizona in the previous six months, as a lack of jurisdiction over custody did not equate to a lack of jurisdiction over a paternity determination, and the Arizona court took testimony, considered its jurisdiction regarding paternity and determined that the putative father was the biological father. U.S.C.A. Const. Art. 4, § 1; A.R.S. §§ 8-106(G), 25-1002(3)(a), 25-1031.

[17] Adoption 17 ⚡15

17 Adoption

17k9 Judicial Proceedings

17k15 k. Review. Most Cited Cases

Error of Utah court, when it granted adoptive parents' motions to dismiss and strike putative father's motion to intervene in adoption proceeding, in concluding that Arizona paternity order was not en-

titled to full faith and credit, was harmless error, as the Arizona paternity order had not bearing on putative father's right to contest the adoption; under Arizona the law the right to contest paternity was a separate and distinct right from the right to contest an adoption, and the Arizona court concluded that it did not have jurisdiction to determine custody. U.S.C.A. Const. Art. 4, § 1; A.R.S. § 8-106(G).

[18] Appeal and Error 30 ⚡1026

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)1 In General

30k1025 Prejudice to Rights of Party as Ground of Review

30k1026 k. In General. Most Cited

Cases

Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.

[19] Adoption 17 ⚡7.2(3)

17 Adoption

17k7 Consent of Parties

17k7.2 Natural Parents, Necessity of Consent in General

17k7.2(3) k. Illegitimate Children. Most Cited Cases

Under Arizona law, the right to contest paternity is distinct from the right to contest an adoption, as a putative father may establish paternity at any time, but he may only establish the right to contest an adoption if: (1) he initiates a paternity action within 30 days of receiving notice of a planned adoption, and (2) that action results in a paternity order. A.R.S. § 8-106(G).

[20] Adoption 17 ⚡11

17 Adoption

17k9 Judicial Proceedings

17k11 k. Petition and Parties. Most Cited Cases

Trial court could make findings of fact, in hearing on adoptive parents' motion to dismiss and strike putative father's motion to intervene in adoption proceeding, without holding an evidentiary hearing, where the trial court provided the parties the opportunity to present evidence, counsel for putative father requested that the matter be argued only on the law and objected to an evidentiary argument, the parties did not present any evidence, and the trial court relied on facts in the record to make its findings. Rules Civ.Proc., Rule 43(b).

[21] Costs 102 ⚡260(5)

102 Costs

102X On Appeal or Error

102k259 Damages and Penalties for Frivolous Appeal and Delay

102k260 Right and Grounds

102k260(5) k. Nature and Form of Judgment, Action, or Proceedings for Review. Most Cited Cases

Putative father's appeal of trial court order granting adoptive parents' motions to dismiss and strike putative father's motion to intervene in adoption proceeding was not frivolous, and thus adoptive parents were not entitled to their attorney fees on appeal; though putative father did not prevail, Supreme Court found that putative father's appeal was not moot as argued by adoptive parents, though putative father failed to preserve two issues he raised on appeal he raised other issues that were properly before the Supreme Court, putative father's argument that had no reason to know that mother was in Utah was not made in bad faith, and putative father's challenge to the lack of an evidentiary hearing was made in good faith. Rules App.Proc., Rule 33(b).

Hutch U. Fale, Provo, Nathan E. Burdsal, Salt Lake City, for petitioners.

H. Mifflin Williams, III, Salt Lake City, Claudia McGee Henry, Los Angeles, CA, for respondent.

On Certification from the Utah Court of Appeals

BACKGROUND

DURRANT, Associate Chief Justice:

INTRODUCTION

*1 ¶ 1 In this case, W.P.W. (“Putative Father”) challenges the adoption of Baby Girl Stine (“B.G.S.”), arguing that the district court erred in ordering the adoption of B.G.S. without his consent. H.U.F. and G.F. (“Adoptive Parents”) defend the district court’s order by arguing that the Putative Father’s consent to the adoption was not necessary because he failed to comply with the statutory requirements that give a putative father the right to contest an adoption.

¶ 2 Specifically, the parties raise the following issues on appeal:

- (1) Whether the Putative Father’s appeal is moot because he appealed only one of two dispositive orders;
- (2) Whether Utah’s statutory scheme for adoptions violated the Putative Father’s due process and equal protection rights, and whether these constitutional challenges were preserved;
- (3) Whether the Putative Father complied with Utah Code section 78-30-4.14, which establishes the requirements a putative father must meet before he may contest an adoption;
- (4) Whether the district court should have granted full faith and credit to Arizona’s Paternity Order;
- (5) Whether the district court should have held an evidentiary hearing; and
- (6) Whether the Putative Father’s appeal is frivolous, warranting the award of attorney fees to the Adoptive Parents.

¶ 3 We affirm the district court’s decision.

¶ 4 On or about September 22, 2005, while the Birth Mother was pregnant with B.G.S., she served two men with notice that she intended to place her baby for adoption through LDS Family Services in Mesa, Arizona. The notice stated that if its recipient wished to assert parental rights to the baby, he was required to initiate a paternity action pursuant to Arizona Revised Statute section 8-106 within thirty days of receipt of the notice. The notice also included the full text of Arizona Revised Statute section 8-106. In addition, the Birth Mother published public notices in Arizona newspapers four times over a period of four weeks between September and October 2005. The public notices were addressed to, “William Patrick Wilks or Nathaniel Davis or John Doe.”

¶ 5 In response, the Putative Father filed a Notice of Claim of Paternity with the Arizona Office of Vital Records on September 29, 2005. This filing placed the Putative Father’s name on the Putative Father Registry in Arizona. As a registrant, the Putative Father had the right to be identified by the vital statistics office if the office were to receive a search letter regarding the child whom the Putative Father claimed he fathered. Thereafter, the entity assisting in the placement of the child for adoption would be responsible for notifying the Putative Father of any legal proceedings regarding the child. The vital statistics office indicated in a letter to the Putative Father that he must follow the provisions of Arizona Revised Statute section 8-106 to establish paternity.

¶ 6 In February 2006, the Birth Mother filed a petition with an Arizona justice court seeking a protective order against the Putative Father. A hearing was held on the matter on February 7. At the hearing, counsel representing the Birth Mother stated that the Birth Mother “went to Utah to get away from [the Putative Father], and to be up there, and that’s where she is, and there’s no need for [the Putative Father] to be allowed to harass her.” The Putative Father responded, “Yes, um [the Birth Mother] told

me when she moved to Utah.”

*2 ¶ 7 The Putative Father never registered with the Utah Office of Vital Statistics as a putative father.

¶ 8 On February 15, 2006, one hundred and forty-five days after being served with notice that the Birth Mother intended to place her baby for adoption, the Putative Father filed a petition for paternity with the Superior Court of Arizona, Maricopa County. Because the Putative Father failed to properly serve the Birth Mother, the petition was not granted.

¶ 9 B.G.S. was born in Utah on March 4, 2006. Two days later, in the Fourth Judicial District Court of Utah, the Birth Mother willingly relinquished all of her parental rights and responsibilities to the Adoptive Parents. The Birth Mother also stated to the district court that she was not, nor had she ever been, married to the natural father of B.G.S. and that the identity of the father was unknown. Further, she stated that the natural father had not initiated a paternity action in Utah, despite having actual notice that the Birth Mother had moved to Utah and planned to give birth to the baby in Utah.^{FN1}

¶ 10 On March 15, 2006, the Adoptive Parents filed a petition for temporary custody and guardianship and a verified petition for adoption, wherein they indicated that “[p]ursuant to Utah Code Ann. § 78-30-4.14, the consent of the natural mother is the only consent required in order for the Court to grant the instant petition.” They further stated that the presumed natural father had actual notice and knowledge that the Birth Mother resided in Utah and that she intended to give birth in Utah. They also stated that the presumed natural father had not registered with the Office of Vital Statistics in the Utah Department of Health, nor had he begun a paternity proceeding in the State of Utah. On March 17, 2006, the district court granted the Adoptive Parents “full and complete custody and guardianship of [B.G.S.] until such time when the Court issues a final order concerning Petitioner’s Petition for Adoption.”

¶ 11 On April 11, 2006, the Putative Father again petitioned the Superior Court of Arizona, Maricopa County for a declaration of paternity. Again, he failed to properly serve the Birth Mother.

¶ 12 On July 25, 2006, in the Superior Court of Arizona, the Putative Father filed a Voluntary Petition for Order of Paternity signed by the Birth Mother. In an order dated August 2, 2006, the Arizona court “note[d]” that this voluntary petition “resolv[ed] the paternity issue.” The court also noted that it lacked jurisdiction to determine custody or child support and ordered that the matter be transferred to Utah for further proceedings.

¶ 13 On July 27, 2006, the Putative Father requested that the Utah court open the sealed Utah file regarding the adoption proceedings. Then, in the Utah court on September 1, 2006, the Putative Father filed an intervenor’s response to the petition for adoption. In an affidavit filed with the court, the Putative Father stated that the Birth Mother told him “verbally and by e-mail ... that she would not give affiant’s baby up for adoption and that she would always keep in touch with affiant.” Further, the Putative Father stated in the affidavit that he “had no knowledge whatsoever, and received no notice whatsoever that [the Birth Mother] resided in Utah and intended to give birth to [B.G.S.] in Utah.”

*3 ¶ 14 On August 31, 2006, and again on November 27, 2006, the Birth Mother submitted an affidavit stating to the Utah court that she never gave the Putative Father notice that she had moved to Utah or planned to give birth in Utah. With the second affidavit, the Birth Mother included an e-mail that she had sent to the Putative Father on February 14, 2006, one week following the protective order hearing. The e-mail stated, “[my parents] made me tell all my friends and some family that I moved to Utah when I really didn’t, nor do I have any intentions of moving to Utah.”

¶ 15 On December 12, 2006, the Adoptive Parents moved to dismiss the Putative Father’s objection to the adoption and motion to intervene. On February

2, 2007, the district court held a hearing on the matter. Counsel for the Putative Father requested that the matter be argued only on the law and objected to an evidentiary argument. The court declined to determine the type of hearing and, instead, left the matter up to counsel. At the hearing, the parties did not present any evidence. The Putative Father was present, but his counsel did not call him to testify.

¶ 16 On April 17, 2007, the district court issued one ruling that granted the Motion to Strike and the Motion to Dismiss. In the ruling, the district court barred the affidavits submitted by the Birth Mother, finding that they contradicted “the law of the case” and were obtained unethically. Next, the court declined to give full faith and credit to the Arizona court’s statement regarding the Putative Father’s paternity, finding that the Arizona court lacked jurisdiction to issue an order of paternity; the court also highlighted additional problems with the order itself. Finally, the court ruled that the Putative Father failed to comply with the Utah statutory requirements for out-of-state putative fathers. Accordingly, the court ruled that the Putative Father “lack[ed] standing to challenge this adoption,” and “Petitioners’ Motion to Strike the Objection and to Dismiss the Motion to Intervene is hereby granted.”

¶ 17 The Putative Father appealed, and the court of appeals heard oral argument in the case. After oral argument, but before any decision issued in this case, the court of appeals issued a split decision in *In re K.C.J.*^{FN2} Concerned that its decision in this case might conflict with its decision in *K.C.J.*, the court of appeals certified this case for immediate transfer to us, pursuant to Utah Rule of Appellate Procedure 43(a). In *K.C.J.*, the court of appeals held that where the district court becomes aware of a putative father’s interest and desire to participate in the adoption proceeding, the court should allow the father to participate, at least to the extent of litigating the legitimacy of his right to contest the adoption.^{FN3} We need not reach the issue presented in *K.C.J.*, however, because the Adoptive Parents have not challenged the Putative Father’s right to

adjudicate whether he may contest the adoption of B.G.S. Rather, the Adoptive Parents make substantive arguments regarding whether the Putative Father has the right to contest the adoption.

*4 ¶ 18 We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(b) (2008).

STANDARDS OF REVIEW

[1][2][3] ¶ 19 The Putative Father challenges the district court’s interpretation of Utah and Arizona statutes, the district court’s finding that the Putative Father failed to comply with Utah and Arizona statutes, and the constitutionality of Utah’s statutory requirements for putative fathers to establish parental rights. We review a district court’s interpretation of a statute for correctness.^{FN4} We review a district court’s findings of fact under a clearly erroneous standard.^{FN5} And we review a district court’s ruling regarding a statute’s constitutionality for correctness.^{FN6}

ANALYSIS

¶ 20 As threshold issues, we first address (1) whether the Putative Father’s appeal is moot, and (2) whether the Putative Father preserved a due process and an equal protection challenge. Holding that the appeal is not moot but that the Putative Father failed to preserve a due process and an equal protection challenge, we then address (3) whether the Putative Father complied with Utah Code section 78-30-4.15 (2005),^{FN7} and (4) whether the district court should have given full faith and credit to the Arizona court’s paternity order. Finally, we turn to (5) whether the district court should have held an evidentiary hearing, and (6) whether the Putative Father’s appeal is frivolous, warranting attorney fees.

I. THE PUTATIVE FATHER’S CLAIMS ARE NOT MOOT BECAUSE HE CHALLENGED THE SUBSTANCE OF THE DISTRICT COURT’S

ONLY RULING

[4]¶ 21 An argument is moot “[i]f the requested judicial relief cannot affect the rights of the litigants.”^{FN8}

[5]¶ 22 The Adoptive Parents argue that the Putative Father's arguments on appeal are moot because they only address one of two dispositive orders by the district court. Particularly, the Adoptive Parents argue that the Putative Father only contests the district court's order granting the Motion to Dismiss Alleged Biological Father's Objection and Motion to Intervene (“Motion to Dismiss”), without contesting the district court's order granting the Motion to Strike the Objection and Motion to Intervene (“Motion to Strike”). The Adoptive Parents state that these motions served different purposes. The Motion to Dismiss asserted that the Putative Father failed to establish “that he is entitled to any interest or right to intervene.” The Motion to Strike asserted that the Putative Father's attempt to intervene was based upon a false assertion of a material fact^{FN9} and should therefore be stricken.

¶ 23 The Putative Father argues in his reply brief that in his opening brief he did challenge the court's order granting the Motion to Strike. In his opening brief, the Putative Father challenged the district court's finding that the Putative Father had knowledge that the Birth Mother was in Utah. Although this challenge to the Motion to Strike is not explicit-nowhere does the Putative Father state that he is challenging the Motion to Strike-the challenge is nonetheless substantively briefed. Accordingly, we hold that the Putative Father challenged the Motion to Strike; therefore, the Putative Father's arguments on appeal are not moot.

II. THE PUTATIVE FATHER FAILED TO PRESERVE HIS DUE PROCESS AND EQUAL PROTECTION CHALLENGES

*5 [6]¶ 24 The Adoptive Parents contend that the Putative Father failed to preserve a due process

challenge and an equal protection challenge in the district court. They are correct.

[7]¶ 25 The preservation requirement is found in rule 24(a) of the Utah Rules of Appellate Procedure, which provides, in relevant part, that for each issue raised on appeal, an appellant's brief must include a “citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court.”^{FN10} To preserve an issue for appeal, the appellant must have raised “a timely and specific objection” before the trial court.^{FN11} We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review.^{FN12}

¶ 26 Rather than advancing grounds upon which we may review an unpreserved issue, the Putative Father argues that he preserved in the trial court all of the issues that he raises on appeal. The Putative Father's brief makes the following statement regarding preservation: “The issues raised in this brief were preserved by appellant's documents filed in the district court, including his Petition and Motion to Intervene, and by the issues discussed by the district court in its Ruling on Motion to Intervene and Motion to Dismiss, dated April 17, 2007.” While the brief does not match record citations with specific issues raised,^{FN13} it does at least reference documents wherein the issues should be found.

¶ 27 Reviewing the documents cited by the Putative Father, we conclude that the Putative Father did not preserve a due process challenge or an equal protection challenge. The Natural Father's Objection and Motion to Intervene as Respondent raises the following arguments: (1) the Putative Father complied with Utah's statute that sets guidelines for out-of-state putative fathers to establish their parental rights; and (2) he complied with the Arizona requirements for putative fathers to establish their parental rights. In its ruling, the district court addressed the following issues: (1) whether the Birth Mother's affidavits should be barred, (2) whether

full faith and credit should be given to Arizona's statement of paternity, and (3) whether the Putative Father complied with the Utah requirements for out-of-state putative fathers to establish paternity rights. It is clear from our review that neither the Putative Father's challenges nor the district court's rulings consider a due process or equal protection challenge. Accordingly, we will not address these issues on appeal.

III. THE PUTATIVE FATHER DID NOT COMPLY WITH THE REQUIREMENTS OF UTAH CODE SECTION 78-30-4.14

¶ 28 Before a putative father may establish the right to contest an adoption in Utah, he must meet the requirements outlined in Utah Code section 78-30-4.14 (Supp.2005). One such requirement is that the putative father register with the Utah Office of Vital Statistics.^{FN14} The statute includes an exception to this requirement, however, if the following circumstances are satisfied: (1) the putative father "resides and has resided in another state where the unmarried mother was also located or resided;" (2) "the mother left that state without notifying or informing the unmarried biological father that she could be located in the state of Utah;" (3) the putative father "through every reasonable means, attempted to locate the mother but does not know or have reason to know that the mother is residing in the state of Utah;" and (4) the putative father "has complied with the most stringent and complete requirements of the state where the mother previously resided or was located, in order to protect and preserve his parental interest and right in the child in cases of adoption."^{FN15}

*6 ¶ 29 The Putative Father admits that he did not comply with the statute's general requirements, but he contends that he qualified for the exception. The district court ruled that the Putative Father did not qualify for the exception because he (1) did not comply " 'with the most stringent and complete' " Arizona requirements " 'in order to protect and preserve his parental interest and right in the child in

cases of adoption,' " and (2) he knew or had reason to know that the Birth Mother could be located in Utah. We address both of the district court's findings in turn.

A. The Putative Father Failed to Comply with the Most Stringent and Complete Arizona Requirements

[8]¶ 30 The district court reasoned that the Putative Father did not comply with the most stringent and complete Arizona requirements established in Arizona Revised Statute section 8-106(G) because he did not initiate a paternity action within thirty days of receiving notice that the Birth Mother intended to give B.G.S. up for adoption.^{FN16} Arizona Revised Statute section 8-106(G) provides, in relevant part, that each potential father shall be served notice of the planned adoption, and the notice shall inform the potential father that his "failure to file a paternity action pursuant to title 25, chapter 6, article 1,"^{FN17} "within thirty days of completion of service"^{FN18} of the notice prescribed by this section, "bars the potential father from bringing or maintaining any action to assert any interest in the child."^{FN19}

¶ 31 The Putative Father argues that this language does not actually impose any time limits on putative fathers because the language is couched in terms of a requirement that the birth mother include the language in her notice to the putative father. He further contends that, for policy reasons, the statute cannot possibly bar a putative father from establishing paternity at any time, otherwise if the birth mother decided not to place the baby for adoption, the putative father would be "off the hook for child support." Finally, he argues that the notice he received was ambiguous and therefore did not actually put him on notice of a mandatory thirty-day limit to initiate a paternity action.

[9]¶ 10[11]¶ 32 The Putative Father's interpretation of the statute is unpersuasive because it produces an absurd result and contradicts the plain language of the statute. When we interpret a statute, " 'we look

first to the statute's plain language to determine its meaning.' ^{FN20} We read the plain language of a statute as a whole and interpret its provisions in harmony with other provisions in the same statute and with other statutes under the same and related chapters. ^{FN21} We seek an interpretation that renders all parts of a statute "relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical or absurd." ^{FN22}

¶ 33 Contrary to the Putative Father's contention, it would be absurd for the Arizona legislature to require a birth mother to give a putative father notice that he had only thirty days to initiate a paternity action but then give the putative father unlimited time to initiate the action. Such a result would render meaningless the provision in the required notice section. Further, the language of section 8-106 is plain and unambiguously requires a putative father to initiate a paternity action within thirty days of receiving notice of a planned adoption; otherwise, he has no right to contest the adoption. This interpretation is not refuted by policy, as the Putative Father contends. Limiting the time in which a putative father may establish the right to contest an adoption does not limit the putative father's financial obligations with respect to that child if the birth mother chooses not to place the child for adoption. Section 8-106 regards only the right to contest an adoption, not any other rights or obligations that a putative father may have regarding his child. ^{FN23}

*7 ¶ 34 The Putative Father's final argument, that the notice he received was ambiguous, is incorrect and irrelevant. He argues that two paragraphs in the notice "contradict each other about whether the [Putative Father] *must* or *may* initiate a paternity proceeding in order to establish interest in the child." We hold that the text of the notice was unambiguous. In one place the notice did read that the Putative Father "may" initiate a paternity action, and, in another place, it stated that the Putative Father "must" initiate the action within thirty days in order to retain a right to contest the adoption.

This language is not ambiguous; it simply clarifies that it is not necessary for the Putative Father to initiate a paternity action if he does not desire to do so. However, if he does desire to, then he must do so within thirty days. Even if the notice were ambiguous, the notice included the text of the statute, which indicated that the father *must* initiate a paternity action within thirty days of receipt of the notice in order to establish the right to contest the adoption. Further, when the Putative Father registered with the Arizona vital statistics office, he again received the text of the statute. Therefore, the Putative Father had sufficient notice of the requirement to initiate a paternity action within thirty days of receipt of the notice of a planned adoption.

¶ 35 We uphold the district court's finding that the Putative Father failed to comply with the most stringent and complete Arizona requirements. The Putative Father failed to initiate a paternity action within thirty days of receiving notice of a planned adoption, as required by section 8-106.

B. The Putative Father Knew or Had Reason to Know That the Birth Mother was in Utah

[12] ¶ 36 The district court reasoned that the Putative Father knew or had reason to know that the Birth Mother was in Utah because, at a protective order hearing that was held less than thirty days before B.G.S. was born, the Birth Mother's attorney stated that the Birth Mother "went to Utah to get away from [the Putative Father], and be up there, and that's where she is." The Putative Father responded, "Yes, um [the Birth Mother] told me when she moved to Utah." We will overturn a district court's findings of fact only if they are "clearly erroneous." ^{FN24}

[13] ¶ 37 The Putative Father argues that he did not know that the Birth Mother was in Utah because he received an e-mail from the Birth Mother one week following the protective order hearing stating that she had not moved to Utah. To discredit the attorney's statement made at the protective order hear-

ing, the Putative Father argues, “no reasonable unmarried father, seeking to vindicate his paternity rights, would base his actions on the representations of the attorney for a woman who has obtained an order of protection against him.” He also argues that he did not know where the Birth Mother was living because the protective order prevented him from contacting her.

*8 ¶ 38 Again, the Putative Father's arguments are unpersuasive. Utah Code section 78-30-4.14 requires only that a putative father “have reason to know” that a birth mother was residing in Utah, not that he have actual knowledge. In open court, the Putative Father testified that the Birth Mother told him that she had moved to Utah. This statement is sufficient for the district court to find that the Putative Father had reason to know that the Birth Mother was in Utah. Although the Birth Mother stated a week later in an e-mail to the Putative Father that she had not moved to Utah, the Putative Father still had reason to believe she was in Utah because she had previously told him that she was there, her attorney told him that she was there, and the Birth Mother's statement that she had not “moved” to Utah did not necessarily mean that she was not staying in Utah until the baby was born and placed for adoption. For these reasons, the district court's finding that the Putative Father had reason to know that the Birth Mother was in Utah is not clearly erroneous.

IV. THE ARIZONA PATERNITY ORDER DOES NOT IMPACT THIS CASE BECAUSE IT WAS UNTIMELY TO ESTABLISH THE PUTATIVE FATHER'S RIGHT TO CONTEST THE ADOPTION

¶ 39 The Putative Father argues that “the Arizona Order of Paternity prevents the adoption of B.G.S. without the [Putative Father's] permission” and that the district court erred in not giving full faith and credit to the paternity order. We hold that the district court did err, but the error was harmless because the Arizona paternity order has no impact on

the Putative Father's unestablished right to contest the adoption.

A. The District Court Committed Harmless Error When It Failed to Give Full Faith and Credit to the Arizona Paternity Order

¶ 40 “Pursuant to the United States Constitution, ‘Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.’”^{FN25} Specifically, we “give full faith and credit to a declaration of paternity or denial of paternity effective in another state if the declaration or denial has been signed and is otherwise in compliance with the law of the other state.”^{FN26}

[14] ¶ 41 The district court declined to give full faith and credit to the Arizona paternity order because the district court found that “the Arizona Court now recognizes that it lacked jurisdiction,” and “[t]his Court, not the State of Arizona, has exclusive jurisdiction regarding custody of [B.G.S.].”^{FN27}

[15][16] ¶ 42 As to matters of jurisdiction, a judgment is entitled to full faith and credit “if the same issue as to jurisdiction was raised in the foreign court and adjudicated therein.”^{FN28} In this case, the Arizona court did take testimony and consider its jurisdiction. The Arizona court stated as follows in its order:

After discussion with the parties present, the Court elicits testimony under oath on the record in open court that the minor child ... does not reside in the state of Arizona and has not resided in the state of Arizona for the past six (6) months.

*9 Pursuant to A.R.S. § 25-1031, this Court does not have jurisdiction to determine *custody* at this time.

(Emphasis added.)

¶ 43 However, the Arizona court did not find that it

lacked jurisdiction to issue a paternity order; rather the court stated that the Voluntary Petition for Order of Paternity “resolv[es] the paternity issue.” The court then ordered the matter transferred to Utah “for all further proceedings.” A lack of jurisdiction as to a custody determination does not equate to a lack of jurisdiction as to a paternity determination. A “child custody determination” is “any judgment, decree or other order of a court, including a permanent, temporary, initial and modification order, for legal custody, physical custody or visitation with respect to a child.”^{FN29} A determination that an individual is the biological father of a child is not a determination that the biological father has custody or visitation rights with respect to that child. Accordingly, the Arizona court concluded that it lacked jurisdiction to determine custody but not to determine paternity.

[17][18]¶ 44 Being aware that the Arizona court had itself concluded that it had jurisdiction, the Utah district court erred in addressing the question of whether the Arizona court, in fact, had jurisdiction. However, the error was harmless. “‘[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.’”^{FN30} In this case, the district court’s error in declining to grant the Arizona paternity order full faith and credit was harmless because the order has no bearing on the Putative Father’s right to contest the adoption of B.G.S.

B. The Arizona Paternity Order Has No Impact on the Putative Father’s Right to Contest the Adoption of B.G.S.

¶ 45 We hold that a declaration of paternity from Arizona does not necessarily establish the right to contest an adoption in Arizona. Rather, the right to contest an adoption is a more narrow right that must be established through specified means.

¶ 46 In Arizona, a putative father must initiate a paternity action within thirty days of receiving notice

of the planned adoption in order to establish the right to contest an adoption.^{FN31} If the putative father fails to initiate a paternity action within the time specified, then he is barred “from bringing or maintaining any action to assert any interest in the child.”^{FN32} This language is found within the statute entitled, “Consent to adoption; who shall consent; waiver; consent to the release of information; notification to potential fathers.”^{FN33}

[19]¶ 47 The Putative Father argues that because the Arizona court, having jurisdiction to do so, issued an order declaring him to be B.G.S.’s father, he need not meet the thirty-day requirement. This is not the case. This interpretation of Arizona law would render the thirty-day requirement meaningless. Under Arizona law, the right to contest paternity is distinct from the right to contest an adoption. A putative father may establish paternity at any time, but he may only establish the right to contest an adoption if (1) he initiates a paternity action within thirty days of receiving notice of a planned adoption and (2) that action results in a paternity order.

*10 ¶ 48 Accordingly, we can consistently give full faith and credit to the Arizona paternity order, but nevertheless hold that the Putative Father did not establish the right to contest the adoption of B.G.S.^{FN34} In failing to give the paternity order full faith and credit, the district court committed error. But that error was harmless because the paternity order alone is insufficient to establish the right to contest the adoption.

V. THE DISTRICT COURT DID NOT ERR IN FAILING TO HOLD AN EVIDENTIARY HEARING

[20]¶ 49 The Putative Father contends that the district court erred in finding facts without holding an evidentiary hearing.

¶ 50 Pursuant to rule 43(b) of the Utah Rules of Civil Procedure, “[w]hen a motion is based on facts

not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.”

¶ 51 In this case, the court provided the parties the opportunity to present evidence. On February 2, 2007, the district court held a hearing on the matter. Counsel for the Putative Father requested that the matter be argued only on the law and objected to an evidentiary argument. The court declined to determine what type of hearing would be held and left the matter up to counsel. At the hearing, the parties did not present any evidence. The Putative Father was present, but his counsel did not call him to testify. Subsequently, the court relied on facts in the record to make its findings.

¶ 52 We hold that the district court did not err in failing to hold an evidentiary hearing. The court provided the parties an opportunity to present evidence, but counsel for the Putative Father declined. Further, the court relied only on facts in the record to make its findings.

VI. THE PUTATIVE FATHER'S APPEAL IS NOT FRIVOLOUS

¶ 53 The Adoptive Parents argue that the Putative Father's “appeal is frivolous as it is not grounded.” The Adoptive Parents base their argument on the following claims: (1) the Putative Father's claim is moot because he only challenged one of two dispositive orders; (2) the Putative Father makes arguments on appeal that he failed to preserve; (3) the Putative Father challenges findings of fact without fully marshaling the evidence that supports those findings; (4) the Putative Father ignores the essential fact he admitted to the court at the protective order hearing—that he knew the Birth Mother went to Utah; and (5) the Putative Father challenges the lack of an evidentiary hearing when it was counsel for the Putative Father who declined an evidentiary hearing.

[21] ¶ 54 The Adoptive Parents' arguments fail to establish that the Putative Father filed a frivolous claim. A frivolous claim under rule 33(b) of the Utah Rules of Appellate Procedure “is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.” We address each of the Adoptive Parents' arguments in turn.

*11 ¶ 55 First, the Putative Father did challenge the substance of both the Motion to Strike and the Motion to Dismiss, therefore his claim is not moot. Second, although the Putative Father failed to preserve two of the issues that he raises on appeal, he still raises other issues that are properly before us for consideration. Third, the Adoptive Parents have not developed a marshaling argument, and failure to marshal is not included in rule 33(b)'s definition of a frivolous appeal. Fourth, the Putative Father has admitted that he stated at the protective order hearing that he knew, at the time, that the Birth Mother was in Utah. He contends, however, that he did not know or have reason to know the Birth Mother was actually in Utah because following the protective order hearing the Birth Mother sent him an e-mail wherein she stated that she had not moved to Utah. While this may not be a strong argument, it does not appear to be a bad faith argument, especially in light of the fact that the Putative Father has submitted the e-mail for the court's review.

¶ 56 Finally, the Putative Father's challenge to the lack of an evidentiary hearing does not appear to be made in bad faith. The Putative Father contends that the district court ruled on facts that the Putative Father did not know were in dispute. Particularly, the district court found that the copy of the Arizona Paternity Order submitted by the Putative Father was not properly certified. The Putative Father argues on appeal that the district court should have provided him an opportunity to submit evidence regarding the validity of the Order before the court ruled on the Order. This appears to be a good faith argument, although it is irrelevant because, as we

--- P.3d ---, 2009 WL 304711 (Utah), 623 Utah Adv. Rep. 14, 2009 UT 10
(Cite as: 2009 WL 304711 (Utah))

have stated earlier, the validity of the order has no bearing on the outcome of the case.

¶ 57 Accordingly, we hold that the Putative Father's appeal is not frivolous, even though we uphold the district court's decision.

CONCLUSION

¶ 58 We affirm the district court's decision. Specifically, we hold that (1) the appeal is not moot because the Putative Father challenged the substance of the two motions; (2) the due process issue and the equal protection issue are not properly before us because the Putative Father failed to preserve them; (3) the Putative Father failed to comply with Utah Code section 78-30-4.14; (4) the district court committed harmless error when it declined to give the Arizona Paternity Order full faith and credit; (5) the district court provided the opportunity for an evidentiary hearing; and, finally, (6) the Putative Father's appeal is not frivolous.

¶ 59 Affirmed.

¶ 60 Chief Justice DURHAM, Justice WILKINS, Justice PARRISH, and Justice NEHRING concur in Associate Chief Justice DURRANT's opinion.

FN1. At first blush, these statements appear contradictory-the natural father is unknown, yet he received actual notice of the Birth Mother's move to Utah. They are reconcilable, however. Because the Birth Mother was having sexual relations with two different men around the time she became pregnant, she was unsure which man was the natural father. Because she gave both men actual notice of her move to Utah, it is accurate to state that the "unknown" father received "actual" notice of the Birth Mother's move to Utah.

FN2. 2008 UT App 152, 184 P.3d 1239.

FN3. *Id.* ¶ 10.

FN4. *Peck v. State*, 2008 UT 39, ¶ 7, 191 P.3d 4.

FN5. *Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶ 18, 181 P.3d 791.

FN6. *In re Adoption of S.L.F.*, 2001 UT App 183, ¶ 9, 27 P.3d 583.

FN7. This statute has been renumbered and revised since the proceedings of this case. Throughout this opinion, we apply the 2005 version of the statute.

FN8. *Black v. Alpha Fin. Corp.*, 656 P.2d 409, 410 (Utah 1982) (citations and internal quotation marks omitted).

FN9. The Adoptive Parents claim that the Putative Father falsely asserted that he did not know that the Birth Mother was in Utah when in fact he did know she was in Utah.

FN10. Utah R.App. P. 24(a)(5)(A)-(B) (2008).

FN11. *State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867 (emphasis omitted) (citations and internal quotation marks omitted).

FN12. *Id.* ¶ 19 ("When a party fails to preserve an issue for appeal, we will address the issue only if (1) the appellant establishes that the district court committed plain error, (2) exceptional circumstances exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue." (citation and internal quotation marks omitted)).

FN13. The record citation is not at all helpful because it encompasses the entire record.

FN14. Utah Code Ann. § 78-30-4.14

FN15.*Id.* § 78-30-4.15(4)(a)-(d).

FN16.*Ariz.Rev.Stat.* § 8-106(G) (2005).

FN17.*Id.* § 8-106(G)(7).

FN18.*Id.* § 8-106(G)(3) (emphasis added).

FN19.*Id.* § 8-106(G)(7); *see also id.* § 8-106(I)(8) (suggesting that the birth mother include the following language in the notice to the putative father: “If you do not file a paternity action under title 25, chapter 6, article 1, Arizona Revised Statutes, and do not serve the mother within thirty days after completion of the service of this notice and pursue the action to judgment, you cannot bring or maintain any action to assert any interest in the child.”).

FN20. *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 35, 194 P.3d 956 (quoting *State v. Gallegos*, 2007 UT 81, ¶ 12, 171 P.3d 426).

FN21. *Id.*

FN22. *Robinson v. Mount Logan Clinic, LLC*, 2008 UT 21, ¶ 9, 182 P.3d 333 (citation and internal quotation marks omitted).

FN23. Section 8-106 is entitled, “Consent to adoption; who shall consent; waiver; consent to the release of information; notification to potential fathers.”

FN24. *Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶ 18, 181 P.3d 791.

FN25. *Mori v. Mori*, 931 P.2d 854, 856 (Utah 1997) (quoting U.S. Const. art. IV, § 1).

FN26. Utah Code Ann. § 78B-15-310

(2008).

FN27. The district court also found two more problems with the order.

First, the court found that the order was a “nullity” because it was issued after the Birth Mother relinquished her rights to B.G.S., and, accordingly the Putative Father lost any right to contest the adoption. We agree. The paternity order was a “nullity” as it pertains to whether the Putative Father may contest the adoption of B.G.S. However, that determination does not mean that we decline to give the order full faith and credit. As our analysis indicates, the right to establish paternity is a separate and distinct right from the right to contest an adoption. The establishment of paternity is only one of many requirements that a putative father must satisfy before he establishes the right to contest an adoption. In this case, the Putative Father failed to meet the additional requirements, therefore it is irrelevant whether he was able to establish paternity.

Second, the district court stated that the order does not “solicit [] judicial confidence” for a myriad of technical reasons. Specifically, the court was concerned that the order was not executed by a judge; the copy provided to the Utah court was not certified; the copy was handwritten by the Birth Mother; and the order was amended by the Arizona court, but the Putative Father failed to present the amended order to the district court. None of the reasons stated by the district court is supported by evidence that the order failed to comply with Arizona law, which is the only requirement we must consider in a full faith and credit analysis. Rule 58(a) of the Arizona Rules of Civil Procedure requires only that, “all

judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so.”The Paternity Order in this case was in writing and signed by the deputy clerk. No one has argued that a deputy clerk is not authorized to sign an order. Further, no other Arizona requirements have been brought before us. Accordingly, we conclude that the Arizona requirements have been met.

FN28. *In re Complaint Against Smith*, 925 P.2d 169, 172 (Utah 1996) (citation and internal quotation marks omitted).

FN29. Ariz. Rev. Stat. § 25-1002(3)(a) (Supp.2008).

The Adoptive Parents look to Arizona Revised Statute sections 25-1031 and 25-1002 to argue that the Arizona court lacked jurisdiction to issue the paternity order. Section 25-1031(A)(1)-(2) states that Arizona does not have jurisdiction to “make an initial child custody determination” unless Arizona is the child’s home state, and a court of another state does not have jurisdiction over the child. Section 25-1002(4) defines “child custody proceeding” as “a proceeding, including a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, *paternity*, termination of parental rights and protection from domestic violence, in which legal custody, physical custody or visitation with respect to a child is an issue or in which that issue may appear.”(Emphasis added.) Thus, the adoptive parents argue that when the Arizona court stated that it lacked jurisdiction to determine custody, it was also stating that it lacked jurisdiction to adjudicate paternity because a custody proceeding is statutorily equivalent to a paternity proceeding. However, the jurisdictional statute regards a “child custody

determination,” not a proceeding. Ariz. Rev. Stat. § 25-1031(A). Further, the definition of a “child custody determination” does not incorporate a paternity determination: a child custody determination is “any judgment, decree or other order of a court, including a permanent, temporary, initial and modification order, for legal custody, physical custody or visitation with respect to a child.”*Id.* § 25-1002(3)(a). Therefore, a lack of jurisdiction over a custody determination does not equate to a lack of jurisdiction over a paternity determination.

FN30. *State v. Spillers*, 2007 UT 13, ¶ 24, 152 P.3d 315 (alteration in original) (quoting *State v. Evans*, 2001 UT 22, ¶ 20, 20 P.3d 888).

FN31. Ariz. Rev. Stat. § 8-106(G)(3) (2005).

FN32. *Id.* § 8-106(G)(6).

FN33. *Id.* § 8-106.

FN34. This situation should not arise in Utah because here, “a declaration of paternity may not be signed or filed after consent to or relinquishment for adoption has been signed.”Utah Code Ann. § 78B-15-302(8) (2008).

Utah, 2009.

H.U.F. v. W.P.W.

--- P.3d ---, 2009 WL 304711 (Utah), 623 Utah Adv. Rep. 14, 2009 UT 10

END OF DOCUMENT

ADDENDUM 2

RECEIVED
SEP 25 2009

FILED
UTAH APPELLATE COURTS

SEP 24 2009

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Young Living Essential Oils,)	MEMORANDUM DECISION
LC,)	(Not For Official Publication)
)	
Plaintiff and Appellee,)	Case No. 20080624-CA
)	
v.)	F I L E D
)	(September 24, 2009)
Carlos Marin,)	
)	
Defendant and Appellant.)	2009 UT App 272

Fourth District, Provo Department, 060402237
The Honorable Samuel D. McVey

Attorneys: Scott B. Mitchell, Salt Lake City, for Appellant
Barnard N. Madsen and Scott D. Preston, Provo, for
Appellee

Before Judges Thorne, Orme, and McHugh.

McHUGH, Judge:

Carlos Marin appeals from the trial court's order granting partial summary judgment in favor of Young Living Essential Oils, LC (Young Living). Marin had defaulted on the parties' contract by failing to meet certain "performance guarantees" detailed in the agreement. On appeal, Marin argues that the trial court erred by granting summary judgment in favor of Young Living. Marin also contests the trial court's award of attorney fees and costs to Young Living. We affirm.

"An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted).

On appeal, Marin does not deny that he failed to meet the performance guarantees contained in the contract. Rather, Marin claims that the trial court erred in granting summary judgment because there was a material issue of fact relating to whether Young Living breached its obligation of good faith and fair

dealing. See generally Utah R. Civ. P. 56(c) (stating that a grant of summary judgment is proper where "there is no genuine issue as to any material fact"). In support of this claim, Marin relies on an affidavit he submitted in opposition to Young Living's Motion for Partial Summary Judgment. In his affidavit, Marin avers that Young Living failed "to provide him with the marketing tools [that] were necessary for him to satisfy his performance guarantees." Young Living counters that Marin's affidavit cannot raise a material issue of fact because it constitutes parol evidence offered to insert additional terms into the parties' written agreement.

The parol evidence rule "operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract." Tangren Family Trust v. Tangren, 2008 UT 20, ¶ 11, 182 P.3d 326 (emphasis and internal quotation marks omitted). "Thus, if a contract is integrated, parol evidence is admissible only to clarify ambiguous terms" Id. In determining the admissibility of parol evidence the court must begin by "determin[ing] whether the agreement is integrated." Id. (internal quotation marks omitted).

An integrated agreement is "a writing . . . constituting a final expression of one or more terms of an agreement." Id. ¶ 12 (internal quotation marks omitted). "[W]hen parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties." Id. (internal quotation marks omitted). The Utah Supreme Court has stated that "we will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause." Id. ¶ 16.

Here, the agreement signed by the parties includes a provision titled "Entire Agreement," which reads, in part,

This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein.

Thus, Marin's agreement with Young Living was integrated because the parties signed a written contract including a clear integration clause. See id. Furthermore, Marin makes no claim that the language of the agreement was ambiguous. Therefore, the parol evidence rule prohibits the use of extrinsic evidence to vary or add terms to the parties' integrated agreement. See id. ¶ 18.

Marin argues that the parol evidence rule does not prohibit the introduction of evidence that Young Living breached the implied covenant of good faith and fair dealing. Marin reasons that "[b]ecause the covenant was already part of the contract at issue[,] . . . [his] testimony in support of his claim for breach of the covenant was not 'offered for the purpose of varying or adding to the terms of' the contract." "While a covenant of good faith and fair dealing inheres in almost every contract, . . . this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante." Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45, 104 P.3d 1226. Rather, the covenant is "implied in contracts to protect the express covenants and promises of the contract." Seare v. University of Utah Sch. of Med., 882 P.2d 673, 678 (Utah Ct. App. 1994) (internal quotation marks omitted).

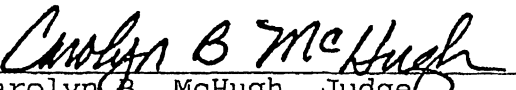
Marin reasons that Young Living breached the covenant of good faith and fair dealing because it failed to provide him promised marketing tools, but no obligation regarding marketing tools was made part of the written agreement. Therefore, we reject Marin's argument that the implied covenant of good faith and fair dealing can be used to incorporate extrinsic evidence of a contemporaneous oral agreement, where the parties' agreement was integrated and the alleged oral agreement was not part of "the express covenants and promises of the contract." Id.

Finally, Marin contests the trial court's award of attorney fees and costs to Young Living. Young Living counters that Marin waived his arguments on attorney fees and costs on appeal because his objection was not timely filed in the trial court. "To preserve an issue for appeal, the appellant must have raised a timely and specific objection before the trial court. We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review." H.U.F. v. W.P.W., 2009 UT 10, ¶ 25, 203 P.3d 943 (citation and internal quotation marks omitted).

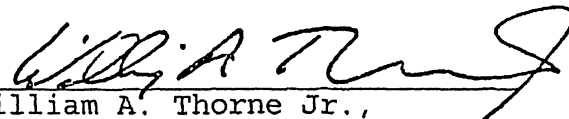
Rule 7(f)(2) of the Utah Rules of Civil Procedure instructs that "[o]bjections to [a] proposed order shall be filed within five days after service." Utah R. Civ. P. 7(f)(2). Young Living served its Proposed Final Judgment and Affidavit of Attorney[] Fees and Costs on May 27, 2008. Marin then had five days as

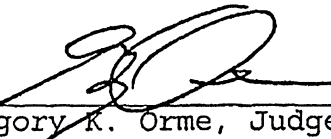
provided by rule 7(f)(2), see id., along with an additional three days following service by mail, see id. R. 6(e), to file his objection. Marin's objection was not filed until June 11, 2008, making it untimely, and his arguments, therefore, are waived on appeal.¹

Accordingly, we affirm.


Carolyn B. McHugh, Judge

WE CONCUR:


William A. Thorne Jr.,
Associate Presiding Judge


Gregory K. Orme, Judge

1. Marin argues that exceptional circumstances warrant our consideration of his arguments as to attorney fees and costs because during the course of the litigation Young Living also failed to comply with filing deadlines. However, Young Living's failings do not excuse Marin's untimely filing.

ADDENDUM 3

SCOTT B. MITCHELL (5111)
2469 East 7000 South, Suite 204
Salt Lake City, Utah 84121
Telephone: (801)942-7048
Facsimile: (801)942-7047
Attorney for Defendant

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

* * * *

YOUNG LIVING ESSENTIAL
OILS, LC,

Plaintiff,

vs.

CARLOS MARIN,

Defendant.

*

* **AFFIDAVIT OF CARLOS MARIN**

*

*

*

*

*

*

*

*

*

*

Case No. 060402237

Honorable Samuel D. McVey

* * * *

Carlos Marin, having been first duly sworn upon his oath,
deposes and says:

1. I am the defendant in this action and I make this
affidavit based upon my own personal knowledge and belief.

2. I was not required to purchase the product which
plaintiff provided to me. In accordance with paragraph 4.3 of
the Field Advisor to Executive Board Distributor Agreement at
issue in this case (hereinafter the "Agreement"), the product was
"to be used for samples in attracting new Distributor/Leaders."
It was never intended by either plaintiff or myself that I would
be obligated to pay for these "samples."

3. Plaintiff is in the business of manufacturing and selling therapeutic grade essential oils and wellness supplements. Historically, plaintiff has sold its products through a network of individuals who are for the most part practitioners of alternative medicine, massage therapists, and quasi-naturopath non-licensed wellness enthusiasts. When plaintiff's representatives first contacted me, they represented to me that they desired to increase their company's sales volume using a mainstream network marketing model, i.e., marketing their products through traditional network marketing sales representatives directly to the individual consumer. Plaintiff's representatives were aware of the fact that I had previously built a global network of more than 500,000 distributors for Amway Corporation using a mainstream network marketing model.

4. In order to induce me to enter into the Agreement, plaintiff represented to me that it was nearing completion of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials (hereinafter referred to as the "marketing tools"). It was clearly understood by both plaintiff and myself that these marketing tools would be absolutely necessary in order for me to be able to meet my performance guarantees under the Agreement and it was represented to me that they would be available for use by February 1, 2005. No experienced leader in this industry would agree to these

performance guarantees without having these marketing tools.

5. Unfortunately, while plaintiff repeatedly promised to do so, plaintiff failed to provide me with any of the necessary marketing tools (except for one mediocre but expensive brochure which my distributors were not interested in purchasing). After plaintiff's failure to provide the marketing tools by February 1, 2005, as promised, I spent more than a month working on my own and in conjunction with the third party vendor hired by plaintiff, Rainmaker Consulting Group, in order expedite the delivery of the marketing tools. I wrote more than 20 marketing and training scripts for video and web based content. On two occasions, I traveled to St. Augustine, Florida to work with Rainmaker Consulting shooting marketing videos. To my knowledge, the videos have never been completed.

6. It was only based upon plaintiff's representations and our mutual understanding that these marketing tools were almost ready and would be provided in a timely manner, that I agreed to the performance guarantees contained in paragraph 3.4 of the Agreement. Without the marketing tools there was virtually no possibility that I could have met the performance guarantees.

7. On or about February 7, 2005, after plaintiff failed to provide the marketing tools as promised, I contacted Gary Young, plaintiff's Chief Executive Officer, and David Stirling, plaintiffs' Chief Operating Officer, with my growing concerns

about my ability to meet the performance guarantees. Mr. Young and Mr. Stirling acknowledged that plaintiff had failed to perform as promised, assured me that my inability to satisfy the performance guarantees would not affect my receipt of the advance payment of \$25,000 due February 15, 2005, and expressed their confidence that the marketing tools would be ready for my use by mid-February to early March 2005.

8. On or about March 16, 2005, Steve Bentley, plaintiff's Chief Financial Officer, informed me that due to my failure to meet the March 15, 2005 performance guarantee, plaintiff was considering withholding further payment to me under the Agreement. In response, I made it very clear to Mr. Bentley that my failure to satisfy the performance guarantee was the unavoidable result of plaintiff's failure to provide the promised marketing tools, that I could and would meet my performance guarantees when the tools were provided, and that I expected plaintiff to continue making payment to me in accordance with the terms of the Agreement. Mr. Bentley acknowledged that plaintiff had failed to perform as promised, represented that plaintiff anticipated that its website would be completed within approximately two weeks, and stated that plaintiff would be making a partial \$15,000 payment to me.

9. On April 12, 2005, I spoke again with Gary Young regarding plaintiff's failure to provide the marketing tools.

Mr. Young responded by telling me that he would "get to the bottom" of the problem and see what he could do.

10. Despite its acknowledgment that it had failed to provide me with the marketing tools which I needed to do my job, and despite its requests that I remain patient while it continued in its efforts to provide the marketing tools, plaintiff failed to pay me \$10,000 of the advance payment due March 15, 2005 in accordance with paragraph 4 of the Agreement and failed to make any of the \$25,000 advance payment due to be paid to me on April 15, 2005.

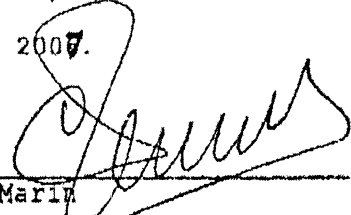
11. On April 26, 2005, I telephoned Mr. Stirling regarding plaintiff's failure to provide the promised marketing tools. Mr. Stirling again assured me that they would be provided soon and again requested my patience.

12. On May 3, 2007, Mr. Stirling notified me that he had received an e-mail from Rainmaker Consulting (i.e., "John's folks") "which indicated they are making progress" on the website. Mr. Stirling asked me to "hold tight". A copy of the e-mail is attached hereto. Thus, 49 days after plaintiff stopped making payments to me in accordance with the Agreement, plaintiff acknowledged that it had still not provided me with the marketing tools which were absolutely essential for me to be able to do my job and again requested my continued patience.

13. On or about June 8, 2005, when plaintiff had still not

provided any of the marketing tools which I needed in order to do my job, I spoke with Mr. Young and informed him that I believed I had been patient long enough in waiting for the repeatedly promised marketing tools and that I could no longer afford to continue to my contractual relationship with plaintiff.

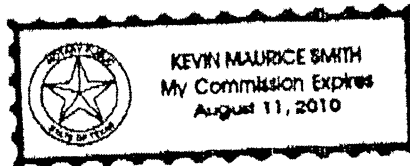
DATED this 1st day of April 2007.


Carlos Marin

SUBSCRIBED AND SWORN TO before me this 1 day of April 2007.


Notary Public

My commission expires:



MAILING CERTIFICATE

Undersigned certifies that a copy of the foregoing was served this 2nd day of April 2007 via first class U.S. Mail, postage prepaid, addressed as follows;

Barnard N. Madsen
Trent M. Sutton
FILLMORE SPENCER, LLC
3301 N. University Avenue
Provo, Utah 84604

ADDENDUM 4

FIELD ADVISOR TO EXECUTIVE BOARD DISTRIBUTOR AGREEMENT

This Agreement entered into on this 12th day of January, 2005 (the "Effective Date") by and between Young Living Essential Oils, LC ("Company") with its principal place of business located at 3215 West Executive Parkway, Lehi, Utah 84043 and Carlos Marin ("MARIN") with his principal place of business located at Miami, Florida (hereinafter collectively referred to as the "Parties").

RECITALS

WHEREAS, "Company" develops and sells proprietary nutritional supplements, essential oils and personal care products ("Products") through a network marketing system throughout the World through a network of independent distributors referred to herein as Distributors ("Distributors");

WHEREAS, MARIN has proposed becoming a Distributor/Leader with sponsorship directly by John Terhune who has a similar agreement with Company; and

WHEREAS, MARIN has significant experience as a Distributor/Leader and through affiliations with John Terhune, in being part of quality motivational and training materials;

WHEREAS, Company is desirous of assisting MARIN in devoting all his time and attention into recruiting additional distributors underneath him and training them;

WHEREAS, MARIN also has numerous contacts with potential Distributor/Leaders who MARIN can bring to the Company and sign as new distributors with the Company;

NOW THEREFORE, for the mutual promises exchanged herein and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged and agreed herein, the Parties agree as follows:

1. Incorporation of Recitals.

The recitals set forth above are hereby incorporated herein by reference as if set forth in their entirety.

2. Term.

The term of this Agreement shall commence as of the Effective Date and shall continue for a period indefinite from the Effective Date.

3. Duties & Responsibilities of Distributor.

3.1 MARIN will become a new Distributor by signing a current Distributor application and be bound by Company's current Policies and Procedures, as amended from time to time.

3.2 MARIN shall recruit additional Distributor/Leaders in an attempt to build his organization extending his best efforts, time and talent to do so.

3.3 MARIN shall devote his full time and attention beginning at execution of this agreement to recruiting new Distributor/Leaders.

3.4 MARIN will meet the following performance guarantees:

- 3.4.1 \$5000 worth of cumulative auto ship volume by February 15th, 2005
- \$30,000 worth of cumulative auto ship volume by March 15th, 2005
- \$100,000 worth of cumulative auto ship volume by April 15th, 2005
- \$300,000 worth of cumulative auto ship volume by May 15th, 2005
- \$600,000 worth of cumulative auto ship volume by June 15th, 2005
- \$900,000 worth of cumulative auto ship volume by July 15th, 2005

3.5 MARIN will use his best efforts to attract and sign with Company new Distributor/Leaders.

3.6 MARIN shall abide by the Company's Policies and Procedures, as amended from time to time, while he maintains his distributorship with the Company.

4. Compensation.

MARIN shall be paid compensation for monthly downline sales pursuant to the current Company compensation plan as amended from time to time.

As additional compensation for services rendered under this Agreement, the Parties agree to the structure of a Fast Cash Program and a Founders Share Program, both of which are explained below.

There will be certain minimum payments which will be advanced to MARIN according to the following schedule:

\$ 25,000.00	due upon execution of this Agreement;
\$ 25,000.00	due February 15, 2005;
\$ 25,000.00	due March 15, 2005;
\$ 25,000.00	due April 15, 2005; for a total expenditure of \$ 100,000.00

These monies advanced to MARIN will be offset by any payments due MARIN under the Fast Cash Program as calculated below. Also, these payments will be offset by any commission payments due MARIN each month as calculated by the standard commission payout plan. For example, if Company owes MARIN \$3,000.00 by March 15, 2005 for commissions, Company will pay MARIN \$25,000.00 on the following April 5, 2005 date as a minimum guaranteed payment. The \$22,000.00 difference will be a credit balance Company will maintain over the course of the agreement to be used to offset future Fast Cash Program payments or future commission run payments. As another example, if the commission run for April 2005 exceeded the minimum guaranteed payment and there were no accumulated credit balances, MARIN would receive the larger amount due under the commission plan payout. If any of the advanced amounts are not repaid by the commission payouts or Fast Cash at the end of the guaranteed payments, these amounts will be deducted from any future commission payout that exceeds \$25,000.00 until these advanced amounts are paid in full (i.e., MARIN will receive the Commission payout up to \$25,000.00 but anything over this amount will be used to repay any unpaid advances until paid in full).

4.1 Fast Cash Program

On May 5, 2005, a snapshot of the most recent month's bonus run will be taken of MARIN's organization.

- a. MARIN will be paid \$1,500.00 each for up to 10 first level distributors (not to exceed \$15,000.00) who have signed on with Company, have Group Volume of greater than \$20,000.00 each and are on autoship.
- b. MARIN will be paid \$1,000.00 each for up to 100 second level distributors (ten each for the Distributor named in (a) above, not to exceed \$100,000.00 total payout) who have signed on with Company, have Group Volume of greater than \$5,000.00 each and are on autoship.

This plan is intended to entice MARIN to quickly build an organization by devoting the necessary time to it. Also, it will provide him with a quick resource of cash to build the business. The total payout, based on MARIN's structure as shown on the bonus calculation described above, will not exceed \$115,000.00 and will be used first as an offset for any advanced payments made that exceed the amounts paid by Company under the standard commission payment plan made to that date.

4.2 Founders' Shares

The purpose of this special bonus, above and beyond the compensation plan, is to provide an incentive for MARIN to use to recruit the best Distributors/Leaders to join the Company on his first level. It will allow MARIN to offer this special bonus to those who will go the extra mile and meet criteria set out below.

- a. By May 1, 2005, MARIN will designate 10 first-line distributors and 50 second line distributors who will participate in this program. These 10 first-level Distributors and 50 second-level distributors (no more than 10 per first-level distributors and no more than 50 second-level distributors) who will participate in this program will be entitled to a "Founder's Share" consisting of a percentage of each distributor's organizational Group Volume (infinite) as follows:

- i. MARIN = 0.40 of GV
- ii. Top 10 (first-level to MARIN) = 0.30% of GV
- iii. Top 50 (5 first level to each Top 10) = 0.30% of GV

- b. Each participating distributor's Founder's Share is earned as follows:

- i. A distributor is entitled to accrue a payment of one-third of their Founder's Share upon achieving "Diamond" (or first level Diamond) status, two-thirds upon achieving "Crown Diamond" (or second level Diamond) status, and full payment upon achieving "Hope Diamond" (or third level Diamond) status.
- ii. If a Distributor fails to qualify in any month under the compensation plan as Diamond, Crown Diamond or Hope Diamond as described above, that distributor

will not be entitled to accrue any Founder's Share payment for that month according to this plan. In addition, the Distributor will only be entitled to accrue a payment for the level the distributorship is currently at for that month, even if that Distributor had previously attained a higher level in a prior month level (e.g., a Diamond will *only be entitled to accrue a one-third share* payment even if that Distributorship previously qualified as a Crown Diamond). When a Distributor meets the described qualifications, that Distributor will accrue the Founder's Share entitlement. The Company will pay The Founder's Share Program payments to each qualified Distributor who has accrued an entitlement at the end of each calendar year.

iii. A Founder's Share is unique to MARIN or to the individual initially named by MARIN in this program and cannot be sold, devised, given, bequeathed, distributed or in any manner transferred to any other person or entity, even if the Distributorship is in the name of an entity. A Share cannot be awarded in a divorce action or it becomes null and void. The Founder's Shares are unique personal service agreements and are entered into between the Company and the individuals named in accordance with subparagraph "a" of this section.

iv. A Founder's Shares is a unique personal services contract and is not a property right or an equity share. Should anyone entitled to a Founder's Share attempt to transfer said share, retire, transfer the distributorship, suffer incapacity, or death, it will constitute a complete termination of all participation in the program. Said Founder's Share becomes null and void as to all parties and no further payments will be made pursuant to that particular agreement.

4.3 Product Entitlement

MARIN shall be entitled to a product credit of \$5,000.00 for January 2005 and \$5,000.00 for February 2005. This product credit is to be used for samples in attracting new Distributor/Leaders and expires at the end of each month in which it is granted. This credit does not count towards product purchase requirements for qualification purposes.

5. Confidential Information.

- 5.1 The Parties recognize that each may disclose to the other, certain confidential information, as herein, that is considered a valuable trade secret or proprietary of the disclosing party. The Parties specifically agree that each will not at any time, during or after the term of this Agreement, in any manner, either directly or indirectly, use, divulge, disclose, or communicate to any person, firm, or corporation, any confidential information of any kind, nature, or Description concerning any matters affecting or relating to the business of the other (hereinafter referred to as "Confidential Information").
- 5.2 Confidential Information which may or may not be disclosed during the performance of this Agreement also includes but is not limited to: "Company" genealogies (being the information held by Company related to its Distributors, including without limitation its relationship with each of its Distributors, the sponsoring of each Distributor, the Distributor's upline and downline, charts, data reports, names, addresses and telephone numbers and other identification materials pertaining to the same, historical purchasing information for each Distributor), proprietary product information which may from time-to-time be made known to MARIN, product formulations and ingredients, the names, buying habits, or practices of any Company

customers or Distributors; Company marketing methods and related data; the names of Company's vendors or suppliers; costs of materials; costs of its Products generally, the prices Company obtains or has obtained or at which it sells or has sold its Products or services; manufacturing and sales costs; lists or other written records used in Company's business; compensation paid to its Distributors and employees and other terms of consultancy thereof; manufacturing processes; scientific studies or analyses other than those published for use by Company for the benefit of its Distributors, details of training methods, new products or new uses for old products, merchandising or sales techniques, contracts and licenses, business systems, computer programs, or any other confidential information of, about, or concerning the business of Company; its manner of operation or other confidential data of any kind, nature or description.

- 5.3 The term "Confidential Information" shall also include information conveyed orally unless the party disclosing the oral information notifies the other party that such information is not confidential and is not subject to this Agreement.
- 5.4 The term "Confidential Information" does not include information that (a) is or becomes generally available to the public through no fault of the receiving party, (b) was known to the receiving party prior to its nondisclosure hereunder, as demonstrated by files in existence at the time of the disclosure, (c) becomes known to the receiving party, without restriction, from a source other than the disclosing party, without breach of this Agreement by the receiving party and otherwise not in violation of the disclosing party's rights, or (d) is explicitly approved for release by written authorization of the disclosing party.
- 5.5 The Parties agree that each shall turn over to the other all equipment, notebooks, documents, memoranda, reports, notes, files, sample books, correspondence, lists, other written and graphic records, and the like, affecting or relating to the business of the other, which is used to prepare, construct, possess, control or otherwise come into the other's possession during the term of this Agreement concerning any process, apparatus or products manufactured, sold, used, developed, investigated or considered by the other concerning the Confidential Information or concerning any other business or activity of the other shall remain at all times the property of disclosing party and shall be delivered to disclosing party upon termination of this Agreement for any reason or at any time upon request.
- 5.6 MARIN agrees that, during the term of this Agreement or upon termination thereof, and if requested by Company to do so, MARIN will sign an appropriate list of any and all Confidential Information of Company of which MARIN has knowledge or about which MARIN has acquired information. All personnel, both contract and employees, representatives, agents and assigns thereof affiliated with MARIN with access to Confidential Information as described hereunder shall be admonished by MARIN regarding the requirement for confidentiality of the same.
- 5.7 The Parties agree that, as between them, all Confidential Information is important, material, trade secret, highly sensitive and valuable to the other's business and its goodwill and is transmitted to the other in strictest confidence.
- 5.8 In the event of breach or threatened breach of this Section by either Party, the non-breaching party will be entitled to an injunction restraining the other party from disclosing, in whole or in part, any Confidential Information to any person, firm, corporation, association or other entity to whom the non-breaching party's Confidential Information, in whole or in part, has been disclosed or threatened to be disclosed. Nothing contained herein will be construed as limiting the non-breaching party from, or prohibiting the non-breaching party from, pursuing any other

remedies available to it for such breach, or threatened breach, including recovery of damages from the breaching party.

All provisions of Section 5, including any and all sub-sections thereof, shall survive the termination or expiration of this Agreement.

6. Indemnification.

6.1 MARIN hereby agrees to indemnify and save Company and hold Company harmless in respect of all causes of action, liabilities, costs, charges and expenses, loss and damage (including consequential loss) suffered or incurred by Company (including legal fees) arising from any willful or grossly negligent act or omission of MARIN or his employees, servants and agents or arising from contravention by MARIN of any of its employees, servants, and agents of any of the terms and conditions imposed on MARIN pursuant to this Agreement.

6.2 Company hereby agrees to indemnify and save MARIN and hold MARIN harmless in respect of all causes of actions, liabilities, costs, charges and expenses, loss and damage suffered or incurred by MARIN (including legal fees) arising from any willful or grossly negligent act or omission of Company or its employees, servants and agents and arising from contravention by Company of any of its employees, servants, and agents of any of the terms and conditions imposed on Company pursuant to this Agreement.

6.3 No party shall be liable to any other party hereunder for any claim covered by insurance, except to the extent that the liability of such party exceeds the amount of such insurance coverage. Nothing in this clause 6.3 shall be construed to reduce insurance coverage to which any party may otherwise be entitled.

7. Representations.

7.1 MARIN has obtained all licenses, permits and other requisite authorizations and has taken all actions required by applicable laws or governmental regulations in connection with its business as now conducted.

7.2 Each of MARIN's employees, consulting and professional personnel assigned to perform the Services as contemplated hereunder shall have the proper skill, training and background so as to be able to perform the services in a competent and professional manner and all work shall be so performed.

7.3 MARIN represents that it is a business in good standing and that its relationship with its suppliers and customers is good.

7.4 MARIN represents that he has successful, favorable experience in providing Services such as the duties as contemplated herein.

8. Default and Termination.

8.1 Cure

In the event any Party to this Agreement shall fail to timely perform or keep any undertaking to which it has agreed herein, then the other party may, upon ten (10) days notice in writing,

during which period the party against whom such default is contended may cure such contended default without affecting any other provision of this Agreement, after which, if such default has not been cured, such party may, should it so elect, terminate this Agreement and sue for damages.

8.2 The present Agreement shall remain binding on each of the parties regardless of any transfer of shares in the capital stock of either party (whether as between existing shareholders, to related shareholders or to new shareholders or any combination thereof), *de facto* or *de jure* change of control of either party, amalgamation with one or more corporations, restructuring of the capital stock of either party or other corporate reorganization of either party.

8.3 The occurrence of any one or more of the following events shall entitle Company to terminate this Agreement (i) without further notice to MARIN where the default raised cannot possibly be cured, or (ii) within ten (10) days of the receipt of written notice of such event where the default in question has not been cured, or (iii) at events which list a date for performance to take place and written notice of said default is sent to the offending party:

8.3.1 should MARIN make an assignment for the benefit of his creditors, file a petition in bankruptcy, be adjudicated insolvent or bankrupt, file a petition or apply to any tribunal for any receiver, trustee, liquidator or sequestrator of any substantial portion of its property, commence any proceeding under any law or statute of any jurisdiction respecting insolvency, bankruptcy, reorganization, arrangement or readjustment of debt, dissolution, winding-up, composition or liquidation, or otherwise take advantage of any bankruptcy or insolvency legislation whether now or hereafter in effect, or if any receiver, trustee, liquidator or sequestrator of any substantial portion of its property is appointed;

8.3.2 should MARIN be incapable of signing new Distributor/Leaders or attaining the volume by the dates set out in the Duties and Responsibilities section; or

8.3.3 should MARIN intentionally violate any of the provisions of this agreement.

8.4 The occurrence of any one or more of the following events shall entitle MARIN to terminate this Agreement (i) without further notice to Company where the default raised cannot possibly be cured and (ii) within ten (10) business days of the receipt of written notice of such event where the default in question may be cured:

8.4.1 should the Company make an assignment for the benefit of its creditors, file a petition in bankruptcy, be adjudicated insolvent or bankrupt, file a petition or apply to any tribunal for any receiver, trustee, liquidator or sequestrator of any substantial portion of its property, commence any proceeding under any law or statute of any jurisdiction respecting insolvency, bankruptcy, reorganization, arrangement or readjustment of debt, dissolution, winding-up, composition or liquidation, or otherwise take advantage of any bankruptcy or insolvency legislation whether now or hereafter in effect, or if any receiver, trustee, liquidator or sequestrator of any substantial portion of its property is appointed;

8.4.2 should the Company cease business operations for any reason for a period of more than sixty (60) days in any Contract Year or for a period of thirty (30) or more consecutive days;

8.4.3 should the Company fail to make two (2) or more payments as set out in the payment schedule; or

8.4.4 should the Company fail to pay when due any other amount due to MARIN hereunder and fail to remedy such default within fourteen (14) days following receipt of written notice thereof;

8.5 No person acting for the benefit of the creditors of either party or any receiver, trustee, liquidator, sequestrator, trustee in bankruptcy, sheriff, officer of a court or person in possession of either party's assets or business shall have any right to continue the performance of this Agreement in any circumstances whatsoever.

9. Notices.

All notices required under this Agreement shall be in writing and shall be sent to the Parties by United States Certified Mail, Return Receipt Requested, postage prepaid to the addresses first written above.

10. No Agency.

This Agreement does not constitute a joint venture, partnership or employment relationship of any kind between MARIN and Company. MARIN shall at all times be considered an independent contractor of Company as to the duties and responsibilities contemplated hereunder. As such, MARIN agrees that during the term of this agreement, it will be responsible for paying any amounts attributed to any compensation paid to MARIN to any and all taxing authorities as required by law.

11. Assignment.

Company may assign and transfer this Agreement, or all or any part of its rights as provided herein to any person, firm or corporation, without limitation, and this Agreement shall be binding on and inure to the benefit of the parties and their successors, representatives and assigns.

Similarly, the Parties acknowledge that this is a personal services contract and understand that MARIN and this contract cannot be assigned by MARIN. The parties do acknowledge that MARIN may personally perform the duties and responsibilities pursuant to the contract under the auspices of a legal entity.

12. Waiver.

A waiver by either party to perform or enforce any term or condition of this Agreement in any instance shall not be deemed or construed to be a waiver of the continuing validity or enforceability of such term or condition.

13. Authority.

The Parties represent that they have full capacity and authority to grant all rights and assume all obligations they have granted and assumed under this Agreement.

14. Severability.

Any portion of this Agreement which may be prohibited or unenforceable in any applicable jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability, but shall not invalidate the remaining portions of such provisions or the other provisions hereof or affect any such provisions or portion thereof in any other jurisdiction.

15. Captions.

The headings of the sections in this Agreement are intended solely for convenience of reference and are not intended and shall not be deemed for any purpose whatsoever to modify or explain or place constriction upon any of the provisions of this Agreement.

16. Governing Law.

The Parties hereto agree that this Agreement shall be governed by the laws of the State of Utah without regard to the conflicts of law principles. The Parties further agree that exclusive jurisdiction and venue to enforce this Agreement shall be in a state or federal court of appropriate jurisdiction in Utah.

17. Counterparts.

This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same document.

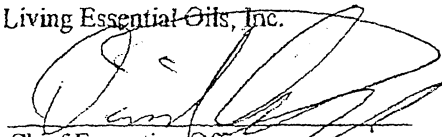
18. Entire Agreement.

This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the Parties, and there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein. No supplement, modification, amendment, waiver or termination of this Agreement shall be binding unless executed in writing and signed by the Parties hereto. This Agreement does not supersede, modify or affect the Distributor Agreement or the Policies and Procedures and MARIN will be bound separately by those agreements.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement on the date first written above.

Young Living Essential Oils, Inc.

By:
Its:


Chief Executive Officer


CARLOS MARIN,

ADDENDUM 5

C

Court of Appeals of Ohio,
Sixth District, Ottawa County.
UNITED STATES CONSTRUCTION CORPORA-
TION et al., Appellants,
v.
HARBOR BAY ESTATES, LTD. et al., Appellee.
No. OT-06-019.

Decided July 27, 2007.

Background: Developer brought action against adjoining landowner for breach of contract, breach of duty of good faith and fair dealing, misrepresentation, and implied easement after landowner failed to connect contiguous water and sewer utilities into developer's residential development and dedicate such to county within 60 days. Landowner filed counterclaim for breach of contract, breach of covenant of good faith, and a claim based on assignment of the easement to development, asserting that development materially breached easement agreement by failing to tender \$45,000 due in compensation for the easement. The Court of Common Pleas, Ottawa County, No. 04-CVH-005, granted landowner's motion for a directed verdict and granted partial summary judgment to landowner on counterclaim. Developer appealed.

Holdings: The Court of Appeals, Osowik, J., held that:

- (1) letter containing a 60-day time frame was inadmissible;
- (2) landowner performed contractual duties within a reasonable time as required by agreement; and
- (3) landowner performed its obligations under easement agreement such that developer breached the agreement when it failed to tender \$45,000 to landowner.

Affirmed.

West Headnotes

[1] Evidence 157 417(19)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k417 Matters Not Included in Writing or for Which It Does Not Provide

157k417(19) k. Duration of Contract and Time for Performance. Most Cited Cases

Easement contact between developer and adjacent landowner was a clear, unambiguous, and complete representation of their intent such that letter containing a 60-day time frame was inadmissible in breach of contract action by application of the doctrine of contract merger and the parol-evidence rule, although agreement did not contain a time frame; agreement indicated that landowner granted developer an easement to allow developer to construct, maintain, repair, replace, relocate, and operate utility lines and facilities for the purpose of obtaining utility service and indicated that developer agreed to pay \$45,000 on completion of construction, installation, and tapping of the utilities, and agreement contained a merger clause stating it constituted the complete agreement of the parties.

[2] Evidence 157 397(1)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k397 Contracts in General

157k397(1) k. In General. Most Cited Cases

The parol evidence rule states that absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.

[3] Evidence 157 ⚡397(1)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k397 Contracts in General

157k397(1) k. In General. Most Cited Cases

The parol evidence rule prevents a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final form.

[4] Evidence 157 ⚡397(1)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k397 Contracts in General

157k397(1) k. In General. Most Cited Cases

Parol evidence is generally not admissible to contradict or vary the terms of an unambiguous written contract.

[5] Contracts 95 ⚡175(1)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k175 Evidence to Aid Construction

95k175(1) k. Presumptions and Burden of Proof. Most Cited Cases

Courts will generally presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement.

[6] Contracts 95 ⚡212(2)

95 Contracts

95II Construction and Operation

95II(D) Place and Time

95k212 Reasonable Time

95k212(2) k. Time for Performance

Where No Time Is Specified. Most Cited Cases

Evidence 157 ⚡417(19)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k417 Matters Not Included in Writing or for Which It Does Not Provide

157k417(19) k. Duration of Contract and Time for Performance. Most Cited Cases

Where no time of performance is specified in a contract, the legal effect is that it is to be performed within a reasonable time and parol evidence is not admissible to show an agreement that it shall be performed at a particular time.

[7] Contracts 95 ⚡213(1)

95 Contracts

95II Construction and Operation

95II(D) Place and Time

95k213 Time of Performance

95k213(1) k. In General. Most Cited Cases

Easements 141 ⚡38

141 Easements

141II Extent of Right, Use, and Obstruction

141k38 k. Relation Between Owners of Dominant and Servient Tenements in General. Most Cited Cases

Adjacent landowner performed contractual duties of construction, installation, and tapping of utilities within a reasonable time as required under agreement with developer that granted developer a utility easement for its development, although landowner did not connect contiguous water and sewer utilities into the development and dedicate such county within 60 days of the agreement; contract did not indicate that time was of the essence or contain any time frame for performance, and landowner did not

172 Ohio App.3d 609, 876 N.E.2d 637, 2007 -Ohio- 3823
(Cite as: 172 Ohio App.3d 609, 876 N.E.2d 637)

intentionally refuse to file the dedication to suppress the sales and development.

[8] Contracts 95 ⚡211

95 Contracts

95II Construction and Operation

95II(D) Place and Time

95k211 k. Time as of the Essence of the Contract. Most Cited Cases

The general rule as to contracts is that the time of performance is not of the essence unless the parties have included an express stipulation to that effect or such a requirement can be implied from the nature or circumstances of the contract.

[9] Contracts 95 ⚡212(1)

95 Contracts

95II Construction and Operation

95II(D) Place and Time

95k212 Reasonable Time

95k212(1) k. In General. Most Cited Cases

Reasonable time for a contract's performance is not measured by hours, days, weeks, months or years, but is to be determined from the surrounding conditions and circumstances which the parties contemplated at the time the contract was executed.

[10] Contracts 95 ⚡168

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k168 k. Terms Implied as Part of Contract. Most Cited Cases

The implied covenant of good faith and fair dealing cannot be used to make an end run around the parol evidence rule.

[11] Easements 141 ⚡38

141 Easements

141II Extent of Right, Use, and Obstruction

141k38 k. Relation Between Owners of Dominant and Servient Tenements in General. Most

Cited Cases

Adjacent landowner performed its obligations under easement agreement with developer when developer succeeded in tapping the utilities on the easement property, and thus developer breached the agreement when it failed to tender \$45,000 to landowner as required under the agreement.

[12] Contracts 95 ⚡326

95 Contracts

95VI Actions for Breach

95k326 k. Grounds of Action. Most Cited Cases

Breach of contract occurs when a party demonstrates the existence of a binding contract or agreement, the nonbreaching party performed its contractual obligations, the other party failed to fulfill its contractual obligations without legal excuse, and the nonbreaching party suffered damages as a result of the breach.

****638** John E. Breen, for appellants.

Erik G. Chappell, Toledo, for appellee.

OSOWIK, Judge.

***612** {¶ 1} This is an appeal from a judgment of the Ottawa County Common Pleas Court, which granted a motion for directed verdict in favor of appellee, Harbor Bay Estates, Ltd. The trial court dismissed all claims filed by appellants and granted partial summary judgment in favor of appellee on his counterclaim in the amount of \$45,000. For the reasons set forth below, this court affirms the judgment of the trial court.

****639** {¶ 2} The following undisputed facts are relevant to the issues raised on appeal. Appellant United States Construction Corporation ("USCC") is a Florida corporation registered in Ohio as a real-estate-development company. In December 1999, USCC acquired an undeveloped tract of land in Ottawa County, Ohio. This property did not contain utility service.

{¶ 3} On July 31, 2003, USCC transferred this land to appellant The Cove on the Bay L.L.C. ("The Cove"). This land was developed into The Cove, a residential development. Greg Spatz is the sole principal of both entities.

{¶ 4} Appellee, Harbor Bay, is an Ohio limited-liability company that engages in residential development. Its land is contiguous to appellants' land. Scott Prephan is the principal of Harbor Bay.

{¶ 5} In May 2003, USCC began to develop The Cove. The principal, Spatz, negotiated with Prephan to obtain an easement over Harbor Bay. In June 2003, Harbor Bay entered into an easement agreement with USCC. Pursuant to the agreement, Harbor Bay granted USCC a 30-foot-wide utility easement ("the easement property"). The grant of easement provided:

{¶ 6} "Grantor grants and conveys to Grantee, its successors and assigns, a non-exclusive, perpetual easement in, over, across, and under the Easement Property for the benefit of Grantee and Grantee's Property for the purpose of constructing, maintaining, repairing, replacing, relocating, and operating utility lines and facilities, as defined later in this paragraph 2, for the distribution of water and sewerage, together with the right to construct lines, pump valves, and lift stations, and all other necessary equipment and appurtenances solely in accordance with plans and specifications reviewed and approved by the Ottawa County, Sanitary Engineering Department ('the Utilities'); provided, however, *613 that all the Utilities shall be connected underground. Grantor shall retain the right to use any surface area of the Easement Property for purposes that are consistent with the grant of the easement herein. Grantee shall not exercise its rights with respect to the Easement Property to the exclusion of the Grantor or to such an extent that it will have the effect of unreasonably interfering with the Grantor's rights in the Easement Property."

{¶ 7} In exchange for the easement rights, Harbor Bay was to receive sizable financial consideration.

Specifically, Paragraph 3 of the agreement provides that the "Grantee shall pay Grantor the sum of Forty-Five Thousand Dollars on completion of Grantor's construction, installation, and tapping of the Utilities."

{¶ 8} On January 3, 2004, appellants initiated this lawsuit against Harbor Bay and set forth claims of breach of contract, breach of duty of good faith and fair dealing, misrepresentation, and implied easement. It was appellants' contention that appellee breached the agreement by failing to connect contiguous water and sewer utilities into appellants' residential development and dedicate such to Ottawa County within 60 days.

{¶ 9} Harbor Bay claimed that it had performed its obligations under the agreement by allowing The Cove to construct and install a tap to the utilities on the easement property. In his trial testimony, Prephan asserted that the agreement between Harbor Bay and USCC did not contain a time of performance or require Harbor Bay to file its plot plan or dedicate its utilities to Ottawa County at a specific time.

{¶ 10} Harbor Bay filed counterclaims against appellants. The counterclaims asserted**640 breach of contract, breach of covenant of good faith, and a claim based on USCC's assignment of the easement to The Cove. It was asserted that The Cove materially breached the agreement by failing to tender \$45,000 due in compensation for the easement.

{¶ 11} The fact that the agreement is silent as to the time of performance is not disputed. However, appellants assert that pursuant to negotiations between the parties, Harbor Bay had a duty to extend water and sewer lines to the property line of The Cove and to ensure dedication of the utilities within a reasonable time. In his trial testimony, Spatz indicated that a letter prepared by him, dated June 5, 2006, and sent to Prephan, without objection to its terms, manifests the intention of a 60-day time frame. He further contends that the agreed sum of \$45,000 was to ensure that the construction process

172 Ohio App.3d 609, 876 N.E.2d 637, 2007 -Ohio- 3823
(Cite as: 172 Ohio App.3d 609, 876 N.E.2d 637)

was expedited and dedication of the utilities was completed within this time frame.

{¶ 12} On September 9, 2005, Harbor Bay filed a motion for summary judgment and sought dismissal of all claims against it asserted by appellants and judgment in the amount of \$45,000 on its counterclaim.

*614 {¶ 13} On November 28, 2005, this matter was heard before the Ottawa County Common Pleas Court. At the close of appellants' case, the trial court rendered an oral decision and granted a directed verdict in favor of Harbor Bay. This decision was formalized on February 17, 2006.

{¶ 14} On February 21, 2006, the trial court granted Harbor Bay partial summary judgment on its counterclaim for a judgment against USCC, in the amount of \$45,000, interests, and costs. On May 18, 2006, the trial court dismissed without prejudice all remaining counterclaims asserted by Harbor Bay.

{¶ 15} On June 14, 2006, appellants filed a timely notice of appeal and set forth the following three assignments of error:

{¶ 16} "A. The lower court erred to the prejudice of appellant U.S. Construction when it granted a directed verdict by failing to properly identify a reasonable time for performance under the contract between the parties.

{¶ 17} "B. The lower court erred, as a matter of law, when it granted a directed verdict against appellant but failed to consider parol evidence regarding the time of performance under the contract between the parties that was embodied in a written letter issued one week prior thereto.

{¶ 18} "C. The lower court erred in granting summary judgment against appellant U.S. Construction on Appellee's claim for payment of \$45,000.00 under the contract."

{¶ 19} There are two preliminary issues we must

address before we can proceed to the merits of appellants' arguments. First, analyzing the assignments in the order presented by appellants is not conducive to our analysis. Our judgment on appellants' second assignment of error is determinative of the validity of appellants' first assignment of error. Accordingly, we will address these assignments of error in reverse order and then proceed to the third. Second, in their first and second assignments of error, appellants challenge the trial court's decision granting a directed verdict in favor of Harbor Bay. A motion for directed verdict pursuant to a Civ.R. 50 is not the applicable standard in a non-jury trial. *Tewarson v. Simon* (2001), 141 Ohio App.3d 103, 115, 750 N.E.2d 176; *Ramco Specialties, Inc. v. Pansegrau* (1998), 134 Ohio App.3d 513, 520, 731 N.E.2d 714.

{¶ 20} It is well established that in a bench trial, the proper motion for judgment**641 at the conclusion of a plaintiff's case is one for dismissal under Civ.R. 41(B)(2). *Harris v. Cincinnati* (1992), 79 Ohio App.3d 163, 607 N.E.2d 15; *Janell, Inc. v. Woods* (1980), 70 Ohio App.2d 216, 24 O.O.3d 266, 435 N.E.2d 1138; *Altamari v. Campbell* (1978), 56 Ohio App.2d 253, 10 O.O.3d 268, 382 N.E.2d 1187; *615 *Jacobs v. Bd. of Cty. Commrs.* (1971), 27 Ohio App.2d 63, 56 O.O.2d 245, 272 N.E.2d 635. Thus, we will construe it as one for involuntary dismissal under Civ.R. 41(B)(2).

{¶ 21} In ruling on a motion for involuntary dismissal under Civ.R. 41(B)(2), the trial court weighs the evidence and resolves any conflict therein, and it may render judgment in favor of the defendant if the plaintiff has shown no right to relief. *Ramco Specialties, Inc.*, 134 Ohio App.3d at 520, 731 N.E.2d 714. Upon review, a trial court's judgment should not be reversed unless erroneous as a matter of law or against the manifest weight of the evidence.

{¶ 22} Therefore, if the record contains competent, credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge, this judgment will not be set aside. *C.E.*

Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578.

[1] {¶ 23} In their second assignment of error, appellants assert that the trial court erred when it failed to consider parol evidence regarding the time of performance under the contract between the parties that was embodied in a written letter issued one week prior to the contact.

{¶ 24} The trial court found that the utility agreement was unambiguous and that introduction of the June 5, 2003 letter would contradict the terms in it. It stated that pursuant to the doctrine of contract merger, "The parties cannot rely on prior statements or agreements to supplement the written agreement without varying its terms." Accordingly, the trial court held that parol evidence cannot be used to contradict the language of the contract.

[2] {¶ 25} We concur with the trial court. The parol evidence rule states that "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 27, 734 N.E.2d 782, quoting 11 Williston on Contracts (4 Ed.1999) 569-570, Section 33:4.

[3][4] {¶ 26} This is a common-law principle that operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final form. *Bellman v. Am. Internatl. Group*, 163 Ohio App.3d 540, 2005-Ohio-5250, 839 N.E.2d 430, ¶ 7; *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 440, 662 N.E.2d 1074. As such, parol evidence is generally not admissible to contradict or vary the terms of an unambiguous written contract. *Id.*

[5][6] {¶ 27} Appellants argue that the June 5, 2003 letter, containing a 60-day time limit, should be considered to explain the parties' intent and the

terms of the agreement. They contend that since the letter does not add to, vary, or *616 contradict the terms of the contract, it is not barred by the parol-evidence rule. However, courts will "[g]enerally * * * presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest Ents., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499; **642 *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 132, 31 OBR 289, 509 N.E.2d 411. Furthermore, when no time of performance is specified in a contract, the legal effect is that it is to be performed within a reasonable time and "parol evidence is not admissible to show an agreement that it shall be performed at a particular time." *Buschmeyer v. Advance Mach. Co.* (1916), 7 Ohio App. 202, 216.

{¶ 28} The doctrine of contract merger, a corollary to the parol-evidence rule, further weakens appellants' argument. In *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271, 638 N.E.2d 572, the Supreme Court of Ohio stated: "Contract integration provides that where the parties' intent is sought to be ascertained from several writings, a prior writing will be rejected in favor of a subsequent one if the latter writing contains the whole of the parties' agreement. If the subsequent agreement is complete and unambiguous on its face, parol evidence is inadmissible to show a contrary intent of the parties."

{¶ 29} In the case at bar, Paragraph 8 of the utility agreement provides: "This agreement contains the entire agreement of the parties. This agreement shall not be amended, changed or modified or any provision waived or discharged, in whole or in part, unless that agreement is in writing and duly signed by the parties hereto."

{¶ 30} Thus, by signing the agreement, it is presumed that appellants incorporated all prior negotiations and agreements into the final agreement and that the final agreement represents the intent and full agreement between the parties. *Fontbank, Inc. v. CompuServe, Inc.* (2000), 138 Ohio App.3d 801, 808, 742 N.E.2d 674; *Figetakis v. Smith* (Mar. 4,

172 Ohio App.3d 609, 876 N.E.2d 637, 2007 -Ohio- 3823
(Cite as: 172 Ohio App.3d 609, 876 N.E.2d 637)

1998), 9th Dist. No. 18393, 1998 WL 114473; *Natl. City Bank v. Donaldson* (1994), 95 Ohio App.3d 241, 245, 642 N.E.2d 58.

{¶ 31} The clear language of the agreement indicates that Harbor Bay granted USCC an easement to allow appellants to construct, maintain, repair, replace, relocate, and operate utility lines and facilities for the purpose of obtaining utility service on their property. It is also clear that USCC agreed to pay Harbor Bay the sum of \$45,000 on completion of construction, installation, and tapping of the utilities. This agreement does not provide a time for performance or include a reference to a timeframe for dedication of the utilities to Ottawa County.

{¶ 32} We acknowledge that the June 5, 2003 letter provides a time for performance. However, it predates the formalized agreement and the record shows that appellants had an attorney, had time to review the agreement, and had the opportunity to bargain for its terms. Therefore, the agreement is a *617 clear, unambiguous, and complete representation of the parties' intent, and parol evidence is inadmissible to contradict its terms.

{¶ 33} For the foregoing reasons, the trial court did not err in holding that the proposed letter was inadmissible by application of the doctrine of contract merger and the parol-evidence rule. This decision and subsequent grant of dismissal in favor of Harbor Bay was not against the manifest weight of evidence or contrary to law. Accordingly, appellants' second assignment of error is not well taken.

[7] {¶ 34} In their first assignment of error, appellants contend that the trial court erred to the prejudice of USCC when it failed to identify a reasonable time for performance under the contract and granted a directed verdict in favor of Harbor Bay.

{¶ 35} Under this assignment of error, appellants assert two arguments. First, they contend that the sole intent of agreement**643 between the parties was to expedite the construction process and ensure water service to USCC's property on a timely basis.

They propose that 60 days is a reasonable time and that the construction, development, and sale of appellants' property could not have been established without it.

{¶ 36} Second, appellants contend that Harbor Bay breached the duty of good faith and fair dealing by refusing to work with USCC to effectuate the purpose of their agreement. Appellants argue that Harbor Bay intentionally refused to file the dedication for almost seven months to suppress the sales and development of USCC's property and to extort additional concessions from USCC before it would file.

{¶ 37} The trial court held that since the 60-day time period is not part of the written agreement between the parties, appellants' entire case fails. We agree.

[8] {¶ 38} The general rule as to contracts is that the time of performance is not of the essence unless the parties have included an express stipulation to that effect or such a requirement can be implied from the nature or circumstances of the contract. *Brown v. Brown* (1993), 90 Ohio App.3d 781, 784, 630 N.E.2d 763.

[9] {¶ 39} "Reasonable time for a contract's performance is not measured by hours, days, weeks, months or years, but is to be determined from the surrounding conditions and circumstances which the parties contemplated at the time the contract was executed." *Miller v. Bealer* (1992), 80 Ohio App.3d 180, 182, 608 N.E.2d 1133.

{¶ 40} It is undisputed that this contract involved a grant of a utility easement for the development of real property. The record indicates that all parties had full knowledge of this fact. However, the agreement at issue does not indicate *618 that time is of the essence. If time was of the essence, it should have been made an essential part of the contract terms.

{¶ 41} Additionally, the record does not indicate

172 Ohio App.3d 609, 876 N.E.2d 637, 2007 -Ohio- 3823
(Cite as: 172 Ohio App.3d 609, 876 N.E.2d 637)

that Harbor Bay failed to perform within a reasonable time or that it intentionally refused to file the dedication to suppress the sales and development of USCC's property. On the contrary, according to the trial testimony of Spatz, the construction, installation, and tapping of the utilities was completed on or before July 1, 2003.

[10] {¶ 42} Having held above that the trial court did not err in finding that the letter indicating a 60-day time limit was inadmissible, there is nothing in the record to indicate that Harbor Bay failed to perform its obligation as set forth in the clear language of the agreement. Furthermore, "[t]he implied covenant of good faith and fair dealing cannot be used to make an end run around the parol evidence rule." *McNulty v. PLS Acquisition Corp.*, 8th Dist. No. 79025, 2002-Ohio-7220, 2002 WL 31875200, ¶ 24. Accordingly, appellants' first assignment of error is not well taken.

[11] {¶ 43} In appellants' third assignment of error, they assert that the lower court erred in granting summary judgment against USCC on Harbor Bay's claim for payment of \$45,000 under the contract.

{¶ 44} In review of a trial court's summary-judgment decision, this court employs a de novo standard of review, applying the same standard used as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving**644 party, reasonable minds can come to but one conclusion, that being that the moving party is entitled to a judgment as a matter of law. Civ.R. 56(C).

{¶ 45} Appellants argue that this case should not have been taken away from the jury's consideration pertaining to the allegations of breach of contract arguably still under dispute.

[12] {¶ 46} Breach of contract occurs when "a

party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach." *Lawrence v. Lorain Cty. Community College* (1998), 127 Ohio App.3d 546, 549, 713 N.E.2d 478; *Circuit Solutions, Inc. v. Mueller Elec. Co.*, 9th Dist. No. 05-CA-008775, 2006-Ohio-4321, 2006 WL 2390269, ¶ 7.

*619 {¶ 47} In order for appellants to prevail in their argument, they would need to show that Harbor Bay failed to perform its contractual obligations without legal excuse. The trial court held that for the reasons clearly set forth and well articulated in defendant's memorandum, "Defendant is entitled to judgment against Plaintiff on its counterclaim in the amount of \$45,000.00, interest and costs." This decision was based on the finding that Harbor Bay had performed the terms of the agreement.

{¶ 48} We concur with the trial court's determination. Appellants failed to sustain the argument of a 60-day time limit. Appellants cannot show that Harbor Bay breached the agreement. As such, Harbor Bay performed its obligations under the agreement when appellants succeeded in tapping the utilities on the easement property. Therefore, appellants breached the agreement when it failed to tender \$45,000.

{¶ 49} Accordingly, there is no issue of fact to be determined. Appellants' third assignment of error is not well taken.

{¶ 50} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay costs of this appeal pursuant to App.R.24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Ottawa County.

Judgment affirmed.

876 N.E.2d 637

Page 9

172 Ohio App.3d 609, 876 N.E.2d 637, 2007 -Ohio- 3823

(Cite as: 172 Ohio App.3d 609, 876 N.E.2d 637)

HANDWORK and PIETRYKOWSKI, JJ., concur.

Ohio App. 6 Dist.,2007.

United States Constr. Corp. v. Harbor Bay Estates,
Ltd.

172 Ohio App.3d 609, 876 N.E.2d 637, 2007 -
Ohio- 3823

END OF DOCUMENT