

2010

Jones and Trevor Marketing, Inc. v. Jonathan L.  
Lowry, Nathan Kinsella, Financial Development  
Services, INC., Jeremy Warburton, John  
Neubaruer, and ESBEX.COM, INC. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JONES & TREVOR MARKETING, INC.,

Petitioner,

vs.

JONATHAN L. LOWRY, NATHAN  
KINSELLA, FINANCIAL  
DEVELOPMENT SERVICES, INC.,  
JEREMY WARBURTON, JOHN  
NEUBAUER, and ESBEX.COM, INC.,

Respondents.

**PETITIONER'S REPLY BRIEF**

Supreme Court Case No. 20100449-SC  
Court of Appeals Case No. 20080904-CA  
District Court Case No. 050100038

Appeal from the Utah Court of Appeals

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## SUMMARY OF THE ARGUMENT

The court of appeals erred in affirming the trial court's grant of summary judgment to Respondents, Jonathan L. Lowry ("Lowry") and Nathan Kinsella ("Kinsella"). Petitioner Jones & Trevor Marketing ("J&T") presented significant evidence of the alter ego factors enumerated in *Colman v. Colman*. Although J&T's evidence focused primarily on the façade factor, there is no reason why substantial evidence supporting one alter ego factor cannot satisfy the unity of interest prong of the alter ego test. J&T's evidence contradicts the facts offered by Lowry and Kinsella in support of summary judgment. Accordingly, viewing the facts in the light most favorable to J&T, there are genuine issues of material fact that preclude summary judgment in favour of Lowry and Kinsella.

## ARGUMENT

The court of appeals erred in affirming the trial court's grant of summary judgment to Lowry and Kinsella. This Court reviews "the court of appeals' decision for correctness. The review focuses on whether the court of appeals correctly reviewed the trial court's decision . . . under the appropriate standard of review." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal citations omitted). "When an appellate court reviews a district court's grant of summary judgment, the facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party, while the district court's legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness." *Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d

312 (internal quotations and citations omitted). With respect to legal conclusions and judgment, this Court gives “no deference to the district court.” *Raab v. Utah Ry. Co.*, 2009 UT 61, ¶ 10, 221 P.3d 219.

Viewing the facts in the light most favorable to J&T, the nonmoving party, summary judgment was inappropriate. This Court should therefore reverse the court of appeals’ decision and remand for a trial on the application of the alter ego doctrine.

**I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT TO LOWRY AND KINSELLA.**

The court of appeals incorrectly affirmed the trial court’s grant of summary judgment to Lowry and Kinsella.

Generally, “a corporation is an entity separate and distinct from its officers, shareholders and directors and . . . they will not be held personally liable for the corporations’ debts and obligations.” *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) (quotations and citations omitted). However, under the alter ego doctrine, “courts [may], upon a proper showing, disregard the integrity of the corporation and view a controlling shareholder as indistinguishable from the corporation, thereby permitting creditors of the corporation to reach the assets of a controlling shareholder.”

*Transamerica Cash Reserve, Inc. v. Dixie Power and Water, Inc.*, 789 P.2d 24, 26 (Utah 1990) (citations omitted). “This [is] done to prevent the legal separation between the corporation and the controlling shareholder from being used to perpetuate an injustice on third parties.” *Id.* The alter ego doctrine “is an equitable doctrine requiring that each case

be determined upon its peculiar facts.” *Salt Lake City Corp v. James Constructors*, 761 P.2d 42, 47 (Utah Ct. App. 1988) (citing *Nat’l Bond Fin Co v Gen. Motors Corp*, 341 F.2d 1022, 1023 (8th Cir. 1965)).

To invoke the alter ego doctrine,

there must be a concurrence of two circumstances: (1) there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.

*Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028, 1030 (Utah 1979).

The following factors “are deemed significant, although not conclusive, in determining whether this test has been met”:

(1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) non-functioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a façade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

*Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987) (citing *Ramsey v. Adams*, 603 P.2d 1025, 1028 (Kan. Ct. App. 1979)); *Amoco Chems. Corp. v. Bach*, 567 P.2d 1337, 1341-42 (Kan. 1977)). In addition to the above factors, courts “look[] through form to substance and ha[ve] often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner.” *Id.* at 786 (quoting *Lyons v Lyons*, 340 So. 2d 450, 451 (Ala. Civ. App. 1976)).



**A. J&T Produced Sufficient Evidence to Preclude Summary Judgment on Its Alter Ego Claim.**

J&T presented significant evidence of the *Colman* factors. J&T presented evidence that Lowry and Kinsella used their corporations “as a façade for operations of the dominant stockholder or stockholders.” Specifically, J&T presented evidence that Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting. (R. 1643.) J&T also presented evidence that Lowry and Kinsella took money from Financial Development Services, Inc. (“FDS”) and Esbex.com (“Esbex”) to fund their personal interests, without proper accounting and in disregard of the money needed to run the corporations (R. 1642-46).

In their brief, Lowry and Kinsella assert that they submitted articles of incorporation for FDS and Esbex demonstrating that the corporations observed corporate formalities and that this evidence is sufficient to preclude piercing the corporate veil under the alter ego theory. *See Respondents’ Brief* at 16-17. Lowry and Kinsella rely on *Schafir v. Harrigan*, 879 P.2d 1384 (Utah Ct. App. 1994). In *Schafir*, the court found that evidence of a corporation’s articles of incorporation, minutes from board of director’s meetings, a corporate annual report filed with the State of Utah, and corporate tax returns sufficiently demonstrated that the corporation observed corporate formalities. 879 P.2d at 1390. However, unlike this case, the appellants in *Schafir*, who opposed summary judgment on their alter ego claim, did not set forth any facts to contradict this evidence. *See id.* at 1389-90. In this case, J&T has presented evidence to contradict Lowry and

Kinsella's evidence. In addition to evidence showing that Lowry and Kinsella used their corporations "as a façade for operations of the dominant stockholder or stockholders," J&T presented evidence of several other *Colman* factors.

For example, J&T presented evidence of "siphoning of corporate funds by the dominant stockholder." Specifically, J&T presented evidence that Kinsella took money from FDS without telling Lowry (R. 1644-45.) Indeed, Lowry and Kinsella acknowledge, in their brief, that "there is some testimony in Neubauer's deposition that in his bankruptcy deposition Neubauer mentioned that he thought he had discovered that Kinsella was 'stealing' from Lowry." *See Respondents' Brief* at 20. Also, J&T presented evidence that Lowry and Kinsella used "the corporate entity in promoting injustice or fraud." Specifically, J&T presented evidence that Lowry and Kinsella kept returned products and resold them to new customers (R. 1642.) J&T presented evidence that Lowry and Kinsella knew that they were taking money earmarked for customer refunds (R. 1643-44.) J&T also presented evidence that Lowry and Kinsella knowingly sold on-going coaching services and failed to report those fees to J&T as required by the contract (R. 1644.) J&T also presented evidence of "undercapitalization." Specifically, J&T presented evidence of the insolvency and dissolution of FDS and Esbex in November 2004 (R. 1695.)

Finally, contrary to Lowry and Kinsella's assertions, J&T also presented evidence relevant to the second prong of the alter ego doctrine. The second prong requires a showing that the observance of the corporate form would sanction a fraud, promote

injustice, or be followed by an inequitable result. The second prong can be met by “show[ing] that the corporation itself played a role in the inequitable conduct at issue.” *Transamerica*, 789 P.2d at 26 (internal quotation marks and citations omitted). J&T has presented evidence that Lowry and Kinsella ran FDS and Esbex as if the two corporations were one entity (R. 1294-95.) As a general rule, satisfaction of this prong “is left to the conscience of the court.” *d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶ 30, 147 P.3d 515 (internal quotation marks and citations omitted).

These material disputed facts are sufficient to preclude summary judgment in favour of Lowry and Kinsella. At the summary judgment stage, J&T was not required to prove its alter ego theory. Rather, J&T was only required to show facts that contradict Lowry and Kinsella’s facts in support of summary judgment.

In *James Constructors*, the appellant challenged the trial court’s summary judgment in favour of the appellee. 761 P.2d at 43. The appellant argued that summary judgment was inappropriate because genuine issues of material fact existed concerning whether a subsidiary corporation was the alter ego of its parent corporation. *Id.* at 45. The Utah Court of Appeals found that the appellant’s affidavit in opposition to the appellee’s motion for summary judgment, read in the light most favourable to the appellant, set forth sufficient disputed facts to preclude summary judgment. *Id.* at 47. The appellant’s affidavit set forth facts showing that the parent corporation owned 100% of the subsidiary’s capital stock; the parent corporation financed the subsidiary and had paid some of its debts; the subsidiary was undercapitalized; the parent corporation’s

directors and officers did not act independently of the corporation; and the parent corporation had advanced funds to the subsidiary on an “as needed” basis, with no formal documentation and no specific requirements for repayment. *Id.*

The court explained that “for [the appellant] to successfully oppose [the appellee’s] motion for summary judgment and send the issue to a fact-finder. it [was] not necessary for it to actually prove its alter ego theory. . . . It [was] only necessary for [the appellant] to show ‘facts’ which controvert the ‘facts’ stated in [the appellee’s] affidavit.”

*Id.* Given the facts stated in the appellant’s affidavit, the court concluded that the appellant showed unresolved factual questions that made the grant of summary judgment to the appellee inappropriate.

Like the appellant in *James Constructors*, J&T was not required to prove its alter ego theory to successfully oppose Lowry and Kinsella’s motion for summary judgment. J&T was only required to show facts that controvert Lowry and Kinsella’s facts. Further, like the appellant in *James Constructors*, J&T has met its burden. Specifically, J&T has shown the following facts that controvert Lowry and Kinsella’s facts: Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting (R. 1643); Lowry and Kinsella took money from FDS and Esbex to fund their personal interests, without proper accounting and in disregard of the money needed to run the corporations (R. 1642-46); Kinsella took money from FDS without telling Lowry (R. 1644-45); Lowry and Kinsella kept returned products and resold them to new customers (R. 1642) ; Lowry and Kinsella knew that

they were taking money earmarked for customer refunds (R. 1643-44); Lowry and Kinsella knowingly sold on-going coaching services and failed to report those fees to J&T as required by the contract (R. 1644); and FDS and Esbex were undercapitalized (R. 1695.) Accordingly, like the appellant in *James Constructors*, J&T has shown unresolved factual questions that make the grant of summary judgment to Lowry and Kinsella inappropriate. Consequently, the court of appeals erred in affirming the trial court's grant of summary judgment to Lowry and Kinsella.

**B. The Court of Appeals Erred in Holding that Evidence of Only One *Colman* Factor is Insufficient to Permit an Analysis of the Alter Ego Doctrine.**

In addition to failing to consider all of J&T's evidence, the court of appeals also failed to properly analyze the evidence of the *Colman* factors. The court noted that "J&T's argument focuses almost exclusively on . . . [the façade factor]." *Jones & Trevor Mktg. v. Lowry*, 2010 UT App 113, ¶ 8, 233 P.3d 538. The court then held that "[w]ithout any evidence of the other alter ego factors, we cannot gauge the materiality of the one factor on which evidence was presented." *Id.* at ¶ 10. This was error. First, as discussed at length above, J&T presented evidence of several alter ego factors, not just the façade factor.

Second, evidence of one factor, in appropriate circumstances, may be sufficient to preclude summary judgment. This is because the alter ego doctrine "is an equitable doctrine requiring that each case be determined upon its peculiar facts." *James Constructors*, 761 P.2d at 47 (citing *Nat'l Bond Fin. Co.*, 341 F.2d at 1023).

Indeed, the *Colman* court noted that the alter ego factors are “significant, although not conclusive.” 743 P.2d at 786. In other words, the alter ego factors are intended to assist a court in determining whether “there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals.” *Norman*, 596 P.2d at 1030. There is no reason why substantial evidence supporting one factor cannot satisfy the unity of interest prong of the alter ego test. Ultimately, a court must “look[] through form to substance.” *Colman*, 743 P.2d at 786 (quoting *Lyons*, 340 So.2d at 451).

J&T has presented ample evidence in support of invoking the alter ego doctrine: Lowry and Kinsella were, at all times relevant to this appeal, the sole shareholders, officers, and directors of FDS and Esbex (R. 1296, 1300, 1693); Lowry and Kinsella ran FDS and Esbex as if the two corporations were one entity (R. 1294-95); Lowry and Kinsella were both aware and in control of all of the financial transactions that took place at FDS and Esbex and determined the allocation of monies to the two entities (R. 1642-43, 1695); When customers returned J&T products, Lowry and Kinsella kept the refunds from J&T and, instead of sending the product back to J&T, resold the product to new customers (R. 1642); Lowry and Kinsella knew that they were taking money earmarked for J&T customer refunds (R. 1643-44); Lowry and Kinsella instructed their employees to omit from their reports to J&T the ongoing monthly fees that Esbex and FDS collected from coaching services (R. 1644); Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation

or accounting and in disregard of the money needed to run the corporations (R. 1642-46); Kinsella took money from FDS without telling Lowry (R. 1644-45); After FDS terminated the agreement with J&T, Lowry and Kinsella made the decision to continue selling coaching, to instruct their employees not to tell J&T about it, and to keep the money derived from the sales (R. 1641-42); FDS and Esbex in fact continued to sell coaching services and continued to use Ted Thomas' name in their sales materials (R. 1323-1567); and in November 2004, FDS and Esbex were deemed insolvent and dissolved (R. 1698.)

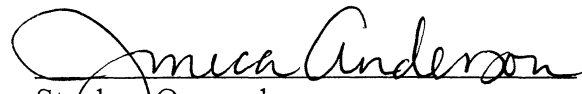
Summary judgment “should only be granted when it appears ‘there is no reasonable probability that the party moved against could prevail.’” *James Constructors*, 761 P.2d at 45 (quoting *Frisbee v. K & K Constr. Co.*, 676 P.2d 387, 389 (Utah 1984)). Viewing the facts in the light most favorable to J&T, there are genuine issues of material fact concerning J&T’s alter ego theory that preclude summary judgment. This Court should therefore reverse the court of appeals’ decision and remand for a trial on the application of the alter ego doctrine.

## CONCLUSION

Therefore, J&T respectfully requests that this Court reverse the opinion of the Court of Appeals and remand this case to the trial court for a trial on the application of the alter ego doctrine.

RESPECTFULLY SUBMITTED this 24th day of January 2011.

HILL, JOHNSON & SCHMUTZ, LC

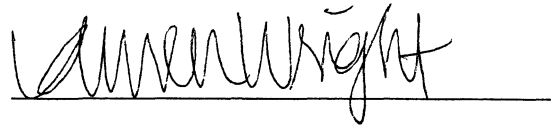
  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 24th day of January 2011, two true and correct copies of the foregoing **PETITIONER'S REPLY BRIEF** were mailed, first-class, postage prepaid, to the following:

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