

2015

**Weiman Ha, Muoi Ha, and Olivia Ha, a Majority of Shareholders of Southeast Supermarket, Inc. Appellants/Plaintiffs, vs. Coung Si Trang, Director for Southeast Supermarket Inc., and Silvia Trang, Secretary for Southeast Supermarket, Inc., Appellees/Defendants**

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



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.

---

**Recommended Citation**

Reply Brief, *Weiman et al v. Coung et al*, No. 20140320 (Utah Court of Appeals, 2015).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/3101](https://digitalcommons.law.byu.edu/byu_ca3/3101)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007– ) 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**IN THE UTAH COURT OF APPEALS**

---

WEIMAN HA, MUOI HA, AND :  
OLIVIA HA, A MAJORITY OF :  
SHAREHOLDERS OF SOUTHEAST :  
SUPERMARKET, INC., :

Appellants/Plaintiffs, :

vs. :

Appellate No. 20140320

COUNG SI TRANG, DIRECTOR :  
FOR SOUTHEAST SUPERMARKET :  
INC., AND SYLVIA TRANG, :  
SECRETARY FOR SOUTHEAST :  
SUPERMARKET, INC., :

District Court Case No. 110913027

District Court Judge: Su J. Chon

Appellees/Defendants. :

---

**APPELLANT'S REPLY BRIEF**

---

Michael P. Petrogeorge  
Parsons Behle & Latimer  
One Utah Center  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
*Attorney for Defendants / Appellee*

Russell T. Monahan  
Cook & Monahan, LLC  
323 South 600 East, Suite 200  
Salt Lake City, UT 84102  
*Attorney for Appellants/ Plaintiffs*

FILED  
UTAH APPELLATE COURT

FEB 09 2015

## TABLE OF CONTENTS

Table of Contents.....	1
Table of Authorities.....	2
Argument.....	3
1.    PLAINTIFF’S DID MARSHAL THE EVIDENCE AND IT WAS INSUFFICIENT TO SUPPORT THE FINDINGS OF THE TRIAL COURT.....	3
2. THE TRIAL COURT MADE UNNECESSARY CREDIBILITY DETERMINATIONS.....	9
3. LAVINA HA SHOULD HAVE BEEN JOINED BY THE DEFENDANTS.....	11
4. THE AWARD OF MEDIATION COSTS WAS AN ABUSE OF DISCRETION.....	12
Conclusion.....	13
Certificate of Compliance.....	14
Certificate of Service.....	15

## TABLE OF AUTHORITIES

<u>Chesapeake &amp; Ohio Ry. Co. v. Martin</u> , 283 U.S. 209 (1931).....	10
<u>First Fed. Savings &amp; Loan Ass'n of Salt Lake City v. Schamanek</u> , 684 P.2d 1257(Utah 1984).....	8
<u>Hal Taylor Assocs. v. Unionamerica, Inc.</u> , 657 P.2d 743 (Utah 1982).	10
<u>Kessimakis v. Kessimakis</u> , 977 P.2d 1226 (UT App 1999).....	10
<u>Kimball v. Kimball</u> , 217 P.3d 733 (UT App 2009).....	5
<u>Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints</u> , 164 P.3d 384 (UT 2007).....	4
<u>State v. Nielsen</u> , 326 P.3d 645 (UT 2014).....	4
<u>Woodward v. LaFranca</u> , 305 P.3d 181 (UT App. 2013).....	10

## **ARGUMENT**

### **1. PLAINTIFF'S DID MARSHAL THE EVIDENCE AND IT WAS INSUFFICIENT TO SUPPORT THE FINDINGS OF THE TRIAL COURT**

In their first section, the Defendants argue that the Plaintiffs failed to marshal the evidence necessary to challenge the trial Court's factual determination. The Defendants failed to identify any evidence supporting the Trial Court's findings that the Plaintiffs failed to identify. The Defendants then in the next section identify 18 bullet points of evidence that supports the Trial Court's findings.

Plaintiffs opening brief identified the proxy statements, Cuong Trang's and Sylvia Trang's testimony regarding the proxy statement. See Plaintiffs' Brief pages 17 and 18 (facts 32-42) and page 38 (Hereinafter, Plaintiffs' Brief is referred to as "Brief", Defendants Brief is referred to as "Defendants' Brief". Plaintiffs identified testimony from Cuong Trang and Sylvia Trang which stated that Lavina Ha owned shares. Brief page 21(fact 59), pages 33-34. Plaintiffs identified the Shareholder Redemption Agreement executed by Lavina Ha. Brief pages 22-3 (facts 63-67) and pages 39-40. Plaintiffs identified this evidence for two purposes. First, under the Plaintiffs burden of challenging the sufficiency of the evidence,

the Plaintiff was obligated to identify the evidence that supported the Trial Court's findings. Second, Plaintiffs demonstrated that the evidence that supported the Trial Court's findings was in fact inconsistent. This is the two step approach that parties challenging a Trial Court determination are obligated to follow. "[T]he party must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. This requires counsel to construct the evidence supporting the adversary's position, and then ferret out a fatal flaw in the evidence." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 17, 164 P.3d 384. (internal cites and quotes omitted). The duty to marshal serves as a "natural extension of an appellant's burden of persuasion." *State v. Nielsen*, 2014 UT 10, ¶ 41, 326 P.3d 645.

Plaintiffs identified the proxy statements that showed Lavina Ha as a purported shareholder. Plaintiffs also showed that the shares claimed by Lavina Ha in those statements were inconsistent with testimony of Cuong Trang and Sylvia Trang as to the number of shares owned by Lavina Ha. Likewise, Plaintiffs presented Cuong Trang's testimony that Lavina Ha

owned 20,000 shares, but the Plaintiffs also contrasted that testimony with Coung Trang's testimony that Lavina Ha owned 37,500 shares. Plaintiffs also offered Coung's testimony that he had no explanation as to why the proxy documents showed that Lavina Ha owned either 4,215 or 4,390 shares. Finally, the Plaintiffs identified the Shareholders Redemption Agreement executed on July 17, 2013 and pointed out that the Agreement itself acknowledged that the shares claimed by Lavina Ha were in dispute. Brief pages 39-40. The Plaintiffs properly identified the evidence that supports the Trial Court's findings and demonstrated its own internal inconsistencies.

The Plaintiffs case did not rely merely on the inconsistencies of the Defendants own statements. A trial court's factual determinations are clearly erroneous only if they are in conflict with the clear weight of the evidence, or if this court has a definite and firm conviction that a mistake has been made." Kimball v. Kimball, 2009 UT App 233, ¶ 14, 217 P.3d 733 (citation and internal quotation marks omitted). The Plaintiffs carried this burden when the Plaintiffs pointed to the evidence that supported the Plaintiffs' position. The Plaintiffs opening brief identified the evidence that supported

the Trial Court's findings, the inconsistencies of that evidence and the evidence that directly contradicted the Trial Court's findings.

Specifically, the Plaintiffs pointed to IRS form 2553 that was signed by Coung Trang, Muoi Ha, Olivia Ha and Weiman Ha and showed a stock breakdown of: Cuong Si Trang - 65,000 shares; Muoi To Ha - 40,000 shares; Weiman Ha - 35,700 shares; Olivia Bac Ha - 5,000 shares. Plaintiffs pointed to the 2005-2008 tax returns that were prepared under the direction of Coung Trang and Sylvia Trang which showed the same shareholder breakdown. The Plaintiffs presented the testimony of Weiman Ha, Olivia Ha and Muoi Ha that was consistent with IRS form 2553 and the tax returns. Finally, the Plaintiffs offered Coung Trang's prior affidavit in which he listed the original shareholders as Coung Trang, Muoi Ha, Olivia Ha and Weiman Ha. Brief pages 31-32. This was not a case of he said she said. The competent evidence only points one way, a stock breakdown of: Cuong Si Trang - 65,000 shares; Muoi To Ha - 40,000 shares; Weiman Ha - 35,700 shares; Olivia Bac Ha - 5,000 shares.

The Defendants Brief asserts that the tax returns and the IRS form 2553 are not reliable. The Defendants assertion relies heavily on the testimony of Sylvia Trang. It is undisputed that Sylvia Trang manufactured

the proxy documents after Weiman Ha made his initial request for a shareholders meeting. See Defendants' Brief page 32 and Plaintiffs' Brief pages 16-19 (facts 31-47). It is undisputed that Sylvia Trang attempted to pass off these documents in this lawsuit as originals. Plaintiff's Brief page 19 (fact 45). The Defendants were not able to produce a single document that was signed by any of the Plaintiffs which acknowledged that Lavina Ha was a shareholder. The Defendants were not able to produce a single document that was received by any of the Plaintiffs prior to Weiman Ha's demand for a shareholders' meeting that listed Lavina Ha as a shareholder. The Defendants did not produce any documents that were submitted to any government agency which listed Lavina Ha as a shareholder. Coung Trang admitted that he signed form 2553 at the inception of the corporation. The Defendants even admitted using form 2553 for tax returns. Again, it is the actions of the Defendants which contradict their own assertions that form 2553 was an inaccurate reflection of the shareholder breakdown.

The Defendants attack their own tax returns. Defendants' Brief pages 22-23. They do so by relying testimony of Sylvia Trang that contained on the hearsay statements of the corporate accountants. The accountants' statements were admissible to show the mental state of Sylvia Trang. Those

same statements cannot then be used for the truth of the matter asserted: that the accountants told Sylvia Trang not to file amended tax returns. In addition, the Defendants offered no business records from the accountants that would support the hearsay statements. Finally, when Sylvia Trang and Coung Trang were questioned about inaccuracies contained within the tax returns, they invoked their right against self-incrimination. Brief page 22 (fact 62) This created the absurdity of the witnesses claiming the tax returns are inaccurate with regard to the stockholders but then being allowed to claim a Fifth Amendment Right against further testifying as to their knowledge of the inaccuracies. When Sylvia Trang and Coung Trang asserted their right against self-incrimination the Trial Court should have drawn an adverse inference regarding the testimony about the tax returns inaccuracies.

In Utah it has long been established that invocation of the right against self-incrimination in a civil matter create an adverse inference. The plaintiffs have to introduce evidence that connects the defendants to the plaintiffs' claim for relief. That evidence must be independent of the inference arising from the defendant's invoking the privilege. *First Fed. Savings & Loan Ass'n of Salt Lake City v. Schamanek*, 684 P.2d 1257, 1267–68 (Utah 1984). In

this case, the Plaintiffs introduced testimony and IRS form 2553 showing the breakdown of the shareholders. When the Defendants invoked their right against testifying as to the accuracy of the shareholder breakdown on the tax returns, the Court should have accepted the Plaintiffs position that the tax returns accurately reflected the shareholder breakdown because that breakdown was tied directly to the Plaintiffs' claim for relief.<sup>1</sup>

From the corporate tax returns prepared under the direction of the Defendants to the IRS 2553 form signed by each of the shareholders at the time of incorporation, the competent documentation as to shareholders leads only to one conclusion, Lavina Ha was not a shareholder. That evidence shows that the shares of the corporation was broken down as follows: Cuong Si Trang - 65,000 shares; Muoi To Ha - 40,000 shares; Weiman Ha - 35,700 shares; Olivia Bac Ha - 5,000 shares.

## **2. THE TRIAL COURT MADE UNNECESSARY CREDIBILITY DETERMINATIONS**

---

<sup>1</sup> Estoppel would be a possible alternative theory. In this case, Sylvia Trang and Coung Trang testified to their benefit that the tax returns were inaccurate as to the shareholder breakdown. When questioned about their responsibilities for those inaccuracies, they invoked their right against self-incrimination. Because they refused to answer questions about their responsibilities for these inaccuracies, they should be estopped from asserting that the tax returns are inaccurate.

A Trial Court is afforded significant deference bearing on the weight and credibility that should be given to evidence, and the Trial Court's determinations will not be overturned unless it is clearly erroneous. Kessimakis v. Kessimakis, 1999 UT App 130, ¶ 16, 977 P.2d 1226. Although the Trial Court is given deference, that deference is not unlimited. Nevertheless, a finder of fact "is [not] at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt." Woodward v. LaFranca, 305 P.3d 181, 185 (UT App. 2013) quoting Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 216, 51 S.Ct. 453, 75 L.Ed. 983 (1931). In this case, under the guise of credibility determinations, the Trial Court disregarded to pieces of evidence, IRS form 2553 and the Corporate Tax Returns. The Trial Court should have given these documents the weight that they deserved.

"When a question arises regarding a written document, the first source of inquiry must be the document itself, considered in its entirety." Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982).

There was no question that IRS form 2553 was completed and then executed by Coung Trang and the Plaintiffs. The Defendant caused the tax returns to be created. The authenticity of IRS form 2553 and the tax returns were not

in question. Both documents should have been taken at face value. There was no basis for the Trial Court to question their underlying substance without some challenge to their authenticity. It was an abuse of discretion for the Trial Court to substitute a credibility determination of the Defendants for the four corners of these documents.

### **3. LAVINA HA SHOULD HAVE BEEN JOINED BY THE DEFENDANTS**

The Plaintiffs were not aware that the Defendants were asserting that Lavina Ha was a shareholder until the eve of trial when the Defendants produced the Shareholder Redemption Agreement. There is nothing in the Defendants answer which indicated that Lavina Ha was a shareholder. The Plaintiffs position was that Lavina Ha had no ownership interest in the Corporation. The Plaintiffs had no obligation to join a party who did not have an interest in this litigation. It was only the Defendants who asserted that Lavina Ha had an interest at trial.

It was the Defendants' asserted position that they were the sole officers of the Corporation. If the Defendants wanted to rely on purported interests of Lavina Ha, then the Defendants had an obligation to bring Lavina Ha into this litigation under Rule 14. There was simply no basis for

the Plaintiffs to bring in Lavina Ha. Admittedly, the Defendants were not obligated to bring in Lavina Ha, however the Defendants should have been prevented from asserting the interests of a non-party.

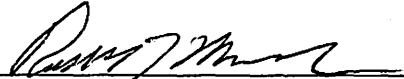
#### **4. THE AWARD OF MEDIATION COSTS WAS AN ABUSE OF DISCRETION**

The parties attended mediation on July 30, 2012. The matter was not settled. On the eve of trial, the Defendants motioned the Court to compel another mediation session. Plaintiffs opposed any further mediation. The basis for the Plaintiffs opposition was the Defendants refusal to provide access to the Corporations financial records. Without such access, the Plaintiffs were in no position to ascertain the value of any offer that the Defendants might present. In essence, the Defendants wanted the Plaintiffs to negotiate in the blind. Under these circumstances it was improper for the Trial Court to order the parties to mediate further. It was an abuse of discretion for that Court to award the Defendants mediation costs on a mediation that the Defendants thwarted by withholding the Corporations financial records.

## CONCLUSION

The evidence before the Trial Court did not support the Trial Courts Findings of Fact. The Trial Court improperly allowed the Defendants to assert the interests of a third party who was not a party to this action. The Trial Court improperly allowed irrelevant issues to cloud the issues before the Court. The clear weight of the evidence supported the Plaintiffs request for the share division. The Court of Appeals should reverse the decision of the Trial Court on the division of the shares. The Trial Court improperly awarded the Defendants costs associated with mediation. This Court should strike that award.

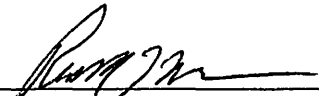
Dated: Monday February 9, 2015.

  
\_\_\_\_\_  
RUSSELL T. MONAHAN  
Attorney for Plaintiffs

### **Certificate of Compliance**

The undersign does hereby certify that this Brief complies with the word count and font limitation. The Brief uses Times New Roman with a 14 point font. Based on the word count program of my Word program, this Brief contains 2441 words.

Dated: Monday February 9, 2015.



---

RUSSELL T. MONAHAN  
Attorney for Plaintiffs

## CERTIFICATE OF SERVICE

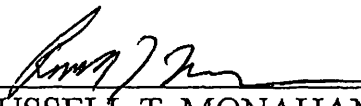
RUSSELL T. MONAHAN hereby declares that he is the attorney for the Plaintiffs herein; and that he served the attached **APPELLANTS REPLY BRIEF** upon:

Michael P. Petrogeorge  
PARSONS BEHLE  
201 South Main Street, #1800  
P.O. Box 45898  
Salt Lake City, UT 84145

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail in Salt Lake City, Utah on: Monday February 9, 2015.

Executed on: Monday February 9, 2015.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

  
\_\_\_\_\_  
RUSSELL T. MONAHAN  
Attorney for Plaintiffs