2012

R. Scott Reynolds v. Jeffrey G. Bickel and Tanner L.C. : Reply Brief

Utah Supreme Court

J. Angus Edwards; R. L. Knuth; Jones, Waldo. Holbrook, and McDonough PC; Attorneys for Plaintiff/Appellant, R. Scott Reynolds.
George W. Burbidge II, Geoffrey C. Haslam, Tyler Snow; Christensen and Jensen; Attorneys for Defendant/Appellees.

IN THE UTAH SUPREME COURT

R. SCOTT REYNOLDS,

Plaintiff / Appellant

v.

JEFFREY G. BICKEL, an individual and **TANNER L.C.**, a Utah limited liability company,

Defendants / Appellees.

JEFFREY G. BICKEL, an individual and **TANNER L.C.**, a Utah limited liability company,

Third-Party Plaintiffs,

v.

ALTAVIEW CONCRETE, L.L.C., a Utah limited liability company,

Third-Party Defendant.

REPLY BRIEF

No. 20120396-SC

Appeal from a Final Order of the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable Robert P. Faust

J. Angus Edwards (USB #4563)
R. L. Knuth (USB #3625)
JONES, WALDO, HOLBROOK & McDONOUGH PC
170 South Main #1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Attorneys for Plaintiff/Appellant, R. Scott Reynolds

George W. Burbidge II
Geoffrey C. Haslam
Tyler Snow
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, UT 84101-1572
Attorneys for Defendants/Appellees

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170 South Main #1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Attorneys for Plaintiff/Appellant, R. Scott Reynolds

George W. Burbidge II
Geoffrey C. Haslam
Tyler Snow
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, UT 84101-1572
Attorneys for Defendants/Appellees

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I. THE ACCOUNTANTS ASK THE COURT TO TURN SUBSECTION (2)(a) INTO MEANINGLESS SURPLUSAGE.

At page 30 of his initial brief, Reynolds identified several decisions from this Court[1] that applied the rule of statutory construction requiring courts to interpret a statute in a way that gives effect to each "word, phrase and clause" of the statute.

At the same page of his initial brief, Reynolds also identified and relied on a decision from the Appellate Court of Illinois, *Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*, 667 N.E.2d 543, 547 (Ill Ct. App. 1996), *appeal denied*, 671 N.E.2d 727 (Table) (Ill. Oct 02, 1996), that applied this rule of statutory construction to the 1986 Illinois Statute that Reynolds discussed in his initial brief:

> Defendants' reading of the statute also runs contrary to these principles of statutory construction. ***If the second clause in subparagraph (2) of section 30.1 meant what defendants claim it means – that there can never be liability unless a letter is written – then the first clause is trumped in all cases and becomes meaningless surplusage.*** Under the Illinois law cited, we decline to adopt the defendants' reading. A third party may state a cause of action under the statute even though there is no writing. (emphasis added)

After Reynolds filed his initial brief, this Court has reiterated this rule. In *State v. Phong Nguyen*, 2012 UT 80, ¶ 18, 722 Utah Adv. Rep. 49 this Court emphasized the "cardinal rule of statutory interpretation that we interpret statutes so that no part or provision will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." (citations omitted).

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[1] *Sindt v. Retirement Bd.*, 2007 UT 16, ¶ 8, 157 P.3d 797; *Faux v. Mickelsen*, 725 P.2d 1372, 1374 (Utah 1986); *Madsen v. Borthick*, 769 P.2d 245, 252 (Utah 1988).

Nowhere in their Appellees' Brief do the Accountants address this basic principle of statutory construction, the opinions of this Court that Reynolds cited, or *Chestnut's* express holding that courts should not construe language such as that contained in UTAH CODE § 58-26a-602(2)(b) ("**Subsection (2)(b)**") in a way that would turn the language of UTAH CODE § 58-26a-602(2)(a) ("**Subsection (2)(a)**") into meaningless surplusage.

II. A STATEMENT OF THE SPONSOR OF LEGISLATION IS EVIDENCE OF LEGISLATIVE INTENT.

Rather than attempting to reconcile with this Court's precedent and the *Chestnut* opinion the plain reality that their interpretation of Subsection (2)(b) eliminates Subsection (2)(a) from UTAH CODE § 58-26a-602 ("**Section 602**"), the Accountants instead take issue with Reynolds' use of legislative history in his initial brief.

In response to Reynolds' citation to Sen. John Valentine's statement during floor debate, the Accountants make dismissive references to the irrelevance of statements by "a legislator", an "individual legislator" and "one legislator". *See* Appellees' Brief at 24-25.

Sen. Valentine was, however, not simply "a legislator". Rather, he was the sponsor of 2000 Utah S.B. 226, which the Utah Legislature enacted as 2000 Utah Laws, ch. 261, and which contains both Subsections (2)(a) and (2)(b) as part of Section 602.

Because Sen. Valentine was speaking as *the sponsor* of the Current Utah Statute, his statement during floor debate that the enacting bill did not involve any "policy change" to the then-existing 1990 Utah Statute is entitled to weight that is not afforded to the words of "a [mere] legislator". *See, e.g., State v. Alfatlawi*, 2006 UT App 511, ¶ 41, 153 P.3d 804, *cert. denied,* 168 P.3d 819 (Utah Jun 12, 2007); *cf. Gottling v. P.R. Inc.*,

2002 UT 95, ¶ 16, 61 P.3d 989; *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 193 (Utah 1989)

III. THE MEANING OF "INTENDED" FOR PURPOSES OF SUBSECTION (2)(b).

In the words of Subsection (2)(b) the required intent is that "the professional services performed on behalf of the client were intended to be relied upon by" Reynolds.

Although the Utah Certified Public Accountant Licensing Act codified at UTAH CODE §§ 58-26a-101 *et seq.* (the "Act") defines certain terms in sections 58-26a-102 and incorporates additional definitions from UTAH CODE § 58-1-102, the Act does not define "intend". The general statutory definitions contained in UTAH CODE § 68-3-12.5 also do not define "intend". In the absence of any statutory definition, it is appropriate to resort to common-law definitions of a word. *Cf. In re Fenner's Estate*, 2 Utah 2d 134, 139, 270 P.2d 449, 452 (1954); UTAH CODE § 68-3-11 ("Words and phrases are to be construed according to the context and the approved usage of the language; . . .").

In *Richards v. Standard Accident Ins. Co.*, 58 Utah 622, 200 P. 1017, 1023 (1921) this Court acknowledged that "every man must be held to intend the natural and probable consequence of his deeds."

More recently, in *Wagner v. State*, 2005 UT 54, ¶¶ 22, 25-26, 122 P.3d 599 this Court employed a definition of "intent" that requires that a battery defendant either (i) desired *to cause* certain consequences, or (ii) believed that those consequences were *substantially likely to result* from defendant's actions.

Then, in *Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, ¶ 43, 203 P.3d 962, this Court held that a workers' compensation defendant "intended" an employee's injuries if the

defendant/employer "knew or expected" that its actions would injure the employee.

Therefore, under Subsection (b)(2) the Accountants "intended" Reynolds' reliance on the Accountants' tax and transactional services and advice if the Accountants (i) desired that Reynolds rely on the professional services that the Accountants' provided to Altaview, (ii) believed that Reynolds' reliance on the Accountants' work for Altaview was *substantially likely to result*, or (iii) *knew or expected* that Reynolds would rely on the professional services that the Accountants provided to Altaview.

Additionally, the "approved usage of the language" that UTAH CODE § 68-3-11 directs Utah courts to apply is consistent with these definitions of "intend". *See, e.g.*, BLACK'S LAW DICTIONARY 881 (9th ed. 2009) (alternatively defining "intend" as "[t]o contemplate that the usual consequences of one's act will probably or necessarily follow from the act, whether or not those consequences are desired for their own sake. . . ."

IV. SUBSECTION (2)(b) DOES NOT REQUIRE THE ACCOUNTANTS' INTENT TO APPEAR IN A SINGLE DOCUMENT.

The Accountants argued below that "[a]n accountant is liable to a non-client under the near privity exception only when the accountant provides the client with *a writing* that meets the requirements of subsection (2)(b)." (R. 199) (emphasis added). The Accountants repeat this argument at page 16 of their Appellees' Brief, where they write:

> The plain language of the near privity exception to the privity of contract rule allows an accountant to extend its potential liability to a non-client only if the accountant and client both intend for a particular non-client to rely on the professional services the accountant provided to the client, and the accountant sent its client *a writing* stating that the accountant intended for the particular non-client to rely on the professional services the accountant performed for the client.

(emphasis added); *see also*, Appellees' Brief, page 29 ("It is telling that Reynolds has never been able to identify *a single writing* from the Accountants to Altaview which stated that the Accountants intended for Reynolds to rely on the professional services the Accountants performed for Altaview. Instead, Reynolds submitted a mishmash of documents which he claimed satisfied subsection (2)(b).")

Throughout their Appellees' Brief, the Accountants repeat their theme of "a" or "the" writing in an effort to create the perception that only a single document can satisfy Subsection (2)(b). Nothing in Subsection (2)(b) or in Utah law generally supports the Accountants' reading of Subsection (2)(b), that the requisite "intent" requires a single, unitary document. In fact, Utah law is the opposite of the Accountants' position.

At page 42 of his initial brief, Reynolds' discussed opinions from this Court[2] establishing that when multiple documents are substantially contemporaneous or exchanged as part of the same transaction and are clearly interrelated or concern the same subject matter, courts construe them as a whole and harmonize their meanings if possible, even if the documents do not refer to one another. The Accountants ignore those opinions in their argument that their intent must appear in a single document.

Even under the formidable strictures of Utah's Statute of Frauds, several writings sharing a common nexus may be construed together as containing all the terms of a contract, notwithstanding the fact they are not all signed by the party whose intent is at issue. *See Gregerson v. Jensen*, 617 P.2d 369, 372-73 (Utah 1980).

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[2] *Winegar v. Froerer Corp.*, 813 P.2d 104, 109 (Utah 1991); *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 267, 501 P.2d 266, 271 (1972)

Gregerson arose under UTAH CODE § 25-5-1, the section of the Utah Statute of Frauds that requires that all estates or interests in real property be "in writing". *See id.* at 372. More recently, the Utah Court of Appeals applied *Gregerson* in concluding that multiple documents can properly be read together to satisfy UTAH CODE § 25-5-3 (2007), the section of the Utah Statute of Frauds that requires that all leases and contracts for interests in real property be "in writing". *See Wilson v. Johnson*, 2010 UT App 137, ¶ 22, 234 P.3d 1156, c*ert. denied,* 241 P.3d 771 (Utah Sep 27, 2010). Following *Gregerson*, the *Wilson* court held that when a contract is expressed in multiple documents, even where some of the documents are unsigned, the statute of frauds is met when the signed writings expressly reference the unsigned writings.

When the "in writing" language of the Statute of Frauds can be satisfied by several signed documents along with unsigned documents that the signed documents reference, it is difficult to see why the "in writing" language of Subsection (2)(b) should mean something different. Nothing in Subsection (2)(b) requires that the Accountants' intention be expressed in a single document and the Accountants offer no explanation or justification for their argument that it does.

The absence from Subsection (2)(b) of any requirement that the Accountants' intention appear in a single document prevents the inference of such a restriction into the statute: "[W]e will not infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and we have no power to rewrite the statute to conform to an intention not expressed." *I.M.L. v. State*, 2002 UT 110, ¶ 25, 61 P.3d 1038 (citations omitted).

The Court should therefore reject the Accountants' argument that Subsection (2)(b) contains any requirement that their intention for Reynolds to rely on the Accountants' tax and transactional services and advice must appear in a single document.

V. SUBSECTION (2)(b) DOES NOT REQUIRE THE ACCOUNTANTS' INTENT TO BE EXPRESSLY STATED.

The Accountants further assert without analysis or support that the trier of fact may not properly infer the Accountants' intent because such an inference "would effectively nullify the writing requirement of the near privity exception." Appellees' Brief at 19-20. According to the Accountants, "the writing requirement in subsection (2)(b) would become meaningless if it can be satisfied by a jury finding by inference from one or more documents that an accountant intended that a non-client rely on the accountant's work." *Id.* As a result, the Accountants urge this court to hold that the required writing "must *expressly state* that the accountant intended for a particular non-client to rely on the accountant's work." *Id.* at 19 (emphasis added).

However, just as Subsection (2)(b) says nothing about a single document, it also does not require an "express statement" of intent. The Accountants provide no basis for this claimed requirement, and the *I.M.L.* decision that Reynolds discusses above makes clear that it would be improper to engraft such a substantive term onto subsection (2)(b).

As is the case with the Accountants' "single-document" argument, their "must expressly state" argument is also contrary to Utah law, demanding as it does, that the Court read into Subsection (2)(b) a limitation on Reynolds' cause of action against the Accountants that is not contained in the language of Subsection (2)(b).

VI. SUBSECTION (2)(b) DOES NOT PROHIBIT THE JURY FROM INFERRING THE ACCOUNTANTS' INTENT.

Inferences are a common and necessary tool in resolving legal disputes because

> [t]he nature of the world about us and the goings on therein are such that we witness only a small percentage of it by direct observation. A large portion of our awareness and knowledge is necessarily derived from deductions based upon our observations of existing facts and circumstances. It is important to apply this principle to the *prerogative* of the court as the fact trier. He is *entitled* to make his findings of fact, not only on evidence concerning direct observations, but also to draw whatever *inferences* a person of ordinary intelligence and experience could fairly and reasonably draw therefrom.

Morris v. Farmers Home Mut. Ins. Co., 28 Utah 2d 206, 209, 500 P.2d 505, 507 (1972) (emphasis added).

The *Morris* opinion later returned to the "prerogative" of the trier of fact when it referred to the "traditional rules which allow the trial court the prerogative not only of finding the facts shown by the direct evidence, but also of drawing any reasonable deductions and inferences that could fairly and reasonably be derived therefrom." *Id.* at 507-08.

The "inference" that this Court has held the trier of fact has the prerogative to make is

> a logical and reasonable conclusion of the existence of a fact in the case, not presented by direct evidence as to the existence of the fact itself, but inferred from the establishment of other facts from which, by the process of logic and reason, based upon common experience, the existence of the assumed fact may be concluded by the trier of the fact.

Wyatt v. Baughman, 121 Utah 98, 109, 239 P.2d 193, 198 (1951)

And the law "requires" that a trial court permit the jury to weigh inferences along with the evidence presented in the case to contravene the inference. *See id.* at 199.

In only the past five years Utah appellate courts have identified numerous instances where it is proper to make inferences regarding disputed issues of intent. *See, e.g., Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, ¶¶ 43, 49, 274 P.3d 935 (inference of intent that a covenant run with the land); *Anderson v. Kriser*, 2011 UT 66, ¶ 26, 266 P.3d 819 ("fraudulent intent is often inferred based on the totality of the circumstances in a case."); *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶ 47, 194 P.3d 931 (inference that the attorneys in different law firms intended to divide the fees in proportion to the services performed by each lawyer); *Ellsworth Paulsen Const. Co. v. 51-SPR-L.L.C.*, 2008 UT 28, ¶¶ 18-19, 183 P.3d 248 (inference of intent to share losses); *Wilson v. Johnson*, 2010 UT App 137, ¶ 22 (inference of intent regarding purchase price increase).

VII. INTENT IS A QUESTION OF FACT FOR THE JURY AND IS INAPPROPRIATE FOR SUMMARY JUDGMENT.

However, the fact that the trier of fact (in this case, a jury) is required when necessary to infer intent *at trial* does not permit a trial court to infer intent – as the trial court did in this case – in connection with a summary judgment motion. In *Wilson v. Johnson*, 2010 UT App 137, ¶ 22, the trial court inferred intent in the process of resolving a summary judgment motion where intent was disputed. The Utah Court of Appeals reversed the trial court because factual disputes about parties' intent cannot be resolved by summary judgment.

In this case, the Accountants themselves have identified the following undisputed facts that could permit the jury to infer at trial that the Accountants intended that Reynolds would rely on the Accountants' professional services:

- Reynolds was both the president and the sole equity owner of the Altaview Companies, the Accountants' clients. (Appellees' Brief at 6);
- Because the Altaview Companies were pass-through companies, the Accountants' tax and transactional services and advice "unavoidably related to Reynolds." (Appellees' Brief at 31);
- The Accountants' tax and transactional services and advice included reviewing estimated taxes and net proceeds from the sale of Altaview that "would ultimately flow through to Reynolds." (Appellees' Brief at 31);
- Reynolds "would ultimately be responsible for taxes on the sale of the Altaview companies." (Appellees' Brief at 32);
- The Accountants drafted the engagement letter which Altaview signed as the Accountants drafted it.[3] (Appellees' Brief at 7-8 & Exhibit 1); and
- The Accountants "knew that a primary intent of Altaview was to have the Accountants' professional services benefit or influence Reynolds." (Appellees' Brief at 10, 16).[4]

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[3] At page 32 of their Appellees' Brief, the Accountants make the curious assertion that Reynolds claims to be "the true intended beneficiary" of the engagement letter between Tanner and Altaview. Reynolds has never taken the position before the trial court or on appeal that he was a "beneficiary" of that agreement, intended or otherwise. Indeed, the word "beneficiary" never appears in Reynolds' initial brief on appeal. Reynolds' position has consistently been that nothing in Section 602 bars his claims against the Accountants because the Accountants *intended* Reynolds' reliance on the Accountants' tax and transactional services and advice at all times during the engagement that followed execution of the engagement letter that the Accountants drafted.

[4] At page 29 of their Appellees' Brief, the Accountants make the unremarkable observation that "[i]f reasonable jurors, properly instructed, would be able to come to only one conclusion there is no genuine issue of material fact." The Accountants fail, however, to analyze this concept or to show how in light of these undisputed facts reasonable jurors could only conclude that the Accountants did *not* intend that Reynolds would rely on the Accountants' tax and transactional services and advice.

At pages 46-48 of his initial brief, Reynolds discussed numerous undisputed and competent documents from which the jury could infer that the Accountants intended that Reynolds would be influenced by, and would rely on, the Accountants' tax and transactional services and advice.

Two particular documents highlight the Accountants' intention:

- In an e-mail Ben Covington asked Bickel to confirm that (i) Reynolds would be personally liable for the Altaview Companies' taxes, and (ii) the Altaview Companies should include income as a basis for Reynolds' stock based on the assumption that Reynolds' proceeds from the closing would be used to pay the Altaview Companies' tax liability. Bickel responded to both of these questions regarding Reynolds' personal tax liability: "You are correct on both points." (R. 295-96, 436, 595-86 (Add. B to Reynolds' initial brief))

- On October 28, 2010, Bickel wrote in an e-mail: "I was reviewing the spreadsheet and I think we may have inadvertently excluded from *Scott's proceeds* the distribution of the installment note, which potentially changes the tax quite a bit." (R. 5, 21, 122, 124, 191, 235, 237 (Add. B to Reynolds' initial brief), 321-23)) (emphasis added)[5]

In *Winegar v. Froerer Corp.*, 813 P.2d 104, 111 (Utah 1991) this Court reversed a trial court's determination of intent as part of its ruling on a summary judgment motion:

> [W]eighing evidence is proper only when making findings of fact, not when determining questions of law in interpreting a contract on a motion for summary judgment. There is sufficient ambiguity regarding the intentions of the parties to this transaction that the trial court could not properly resolve this action in the Winegars' favor as a matter of law. We therefore reverse and remand this case for trial on the issue of intent.

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[5] At page 9 of their Appellees' Brief, the Accountants paraphrase the contents of this e-mail so as to remove its express references to Reynolds and to Reynolds' personal tax liability: "In late October, 2010, while reviewing one of Covington's spreadsheets, Bickel realized that it did not include the principal amount of an installment note as an asset that was distributed at closing."

See also, *Ellsworth Paulsen Const.*, 2008 UT 28, ¶ 19 (improper to infer on summary judgment whether contracting parties intended to share losses).

CONCLUSION

For the foregoing reasons this Court should REVERSE the trial court's summary judgment that the Accountants did not indicate in writing that the Accountants intended for Reynolds to rely on the Accountants' tax and transactional services and advice.

DATED: January 23, 2013

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By: _____
J. Angus Edwards
R. L. Knuth
Attorneys for Plaintiff/Appellant, R. Scott Reynolds

CERTIFICATE OF COMPLIANCE

I hereby certify that the word processing system used to prepare the foregoing Reply Brief indicates that it contains 3,422 words exclusive of (i) cover text, (ii) the table of contents, (iii) the table of citations, (iv) this certificate of compliance and (v) the certificate of service in the proportionately spaced Times New Roman font. That word count complies with the 7,000 word type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1)(A).

DATED: January 23, 2013

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

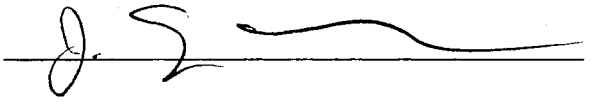
By: _____

J. Angus Edwards
R. L. Knuth
Attorneys for Plaintiff/Appellant, R. Scott Reynolds

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 23, 2013, I caused two true and correct copies of the foregoing **REPLY BRIEF** to be hand delivered to:

George W. Burbidge II
Geoffrey C. Haslam
Tyler Snow
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, UT 84101-1572



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