2016

Michael and Susan Morris, Plaintiffs/Appellants, vs. Garrett B. Gunderson, Freedom Fast Track, LLC, Andrew Howell and Durham Jones & Pinegar. p.c., Defendants/Appellees

Utah Court of Appeals

39151

IN THE UTAH COURT OF APPEALS

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Michael and Susan Morris, Plaintiffs/Appellants, vs. Garrett B. Gunderson, Freedom Fast Track, LLC, Andrew Howell and Durham Jones & Pinegar, P.C., Defendants/Appellees.	)	20150604-CA Appellate Case No. ~~20141087-CA~~

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BRIEF OF APPELLANTS

APPEAL FROM SUMMARY JUDGMENT
TAKEN FROM THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH
Judge James R. Taylor Presiding

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JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2015). The appeal was transferred to the Court of Appeals from the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are these:

1. Did the trial court err in granting Appellees' motions for summary judgment by holding that there were no genuine issues as to any material fact and that Appellees were entitled to judgment as a matter of law?

Standard of Review

With respect to summary judgments, Rule 56(c) of the Utah Rules of Civil Procedure states: "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."

The standard of appellate review of a summary judgment is that the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to that party. The trial court's legal conclusions are not given any deference on appeal, and they are reviewed for correctness. Mountain West Surgical Center v. Hospital Corporation of Utah, 2007 UT 92.

STATUTES AND RULES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE TO THE APPEAL

Rule 56(a) of the Utah Rules of Civil Procedure is of central importance to the appeal, as it contains the requirements to be met in determining whether to grant summary judgment. In relevant part the Rule states: "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

Nature of the Case

Appellants, the Morrises, claim fraud, contract breach, breach of fiduciary duty and legal malpractice against Appellees in connection with a ponzi scheme, under the guise of a total financial planning package. Each of the participants in the scheme

reinforced each others' vital role in the scheme. Appellants were persuaded to purchase expensive whole life insurance policies and advised to purchase real properties as investments.

Appellants had insufficient assets and income to accomplish either of these. Investible funds could only be generated if Appellants were convinced to take out loans against their 401(k) and to take out mortgages on their home to invest with Atlas Capital, with the false promise that they would achieve a high rate of return from Atlas Capital to fund their investment company.

Creation of a personal holding company and estate planning were necessary to give the illusion of limiting risk, encapsulated investments and planning for future generations. The scheme was perpetrated through continuous face-to-face meetings, seminars, and newsletters, all designed and having the effect of legitimizing the ponzi scheme.

Appellees sought and obtained summary judgment from the Fourth District Court on the base that there is no disputed issue of material fact as to Appellees' participation in the scheme to defraud Appellants.

Course of Proceedings

Plaintiffs/Appellants filed their complaint August 31, 2009. R.1, and their Amended Verified Complaint February 25, 2011. R. 132. Defendants/Appellees Garrett B. Gunderson and Freedom Fast Track, LLC filed their answer March 11, 2011. R.171. Defendant/Appellee Durham Jones & Pinegar, P.C. filed its answer April 4, 2011. R.212.

Defendants/Appellees Andrew Howell and Durham Jones & Pinegar, P.C. filed their motion for summary judgment July 30, 2014. R. 303. Defendants/Appellees Garrett B. Gunderson and Freedom Fast Track, LLC filed their motion for summary judgment July 31, 2014. R. 565. A hearing on the motions was heard by the Fourth District Court, the Honorable James R. Taylor presiding, on October 6, 2014. R. 641. The Court issued an order granting the motions for summary judgment on October 22, 2014. R. 642.

Appellants filed their Notice of Appeal on July 17, 2014 (R. 744), following Summary Dismissal by the Supreme Court and an Order of Dismissal entered by the trial court on June 18, 2015. R. 740. The case subsequently was poured-over to the Court of Appeals by Order dated July 28, 2015. R. 150.

STATEMENT OF FACTS

1. The Morrises lost hundreds of thousands of dollars based on Appellees' schemes and deceptions, under the guise of a total financial planning package. R. 135-150. Statement of Susan Morris pp 3, 4, 6, 7 describing fees paid ($7,500 tuition) and $51,000 withdrawn from 401K and $240,000 unsecured Promissory Note to Atlas Capital. R. 333, 334, 336, 337.

2. Appellees' ponzi scheme was an elaborate one in which each of the Appellees reinforced each of the other Appellees' vital role in the scheme. The scheme was perpetrated through continuous face-to-face meetings, seminars, and newsletters, all designed and having the effect of legitimizing the scheme. R. 135-150. Statement of

Susan Morris described the seminar, the many meetings with Appellees, all as part of the financial planning process of Curriculum for Wealth and Producer Revolution. R. 332-342.

3. Large whole life insurance policies, and correspondingly large monthly premiums, could only be justified and funded if Plaintiffs placed substantial sums with Atlas Capital, with the false promise that they would achieve a high rate of return on the investment to fund the premium payments. Statement of Susan Morris. R. 336.

4. Given The Morrises' limited income, free, investible funds could only be generated if The Morrises were convinced to take out loans against their 401(k) and to take out mortgages on their home to invest with Atlas Capital. Statement of Susan Morris R. 337.

5. Creation of a personal holding company and estate planning were necessary to give the illusion of limiting risk, encapsulated investments and planning for future generations. The Appellees collectively had to convince Appellants that each of the steps noted above had to be taken in concert to achieve the result of complete financial planning.

6. The Morrises knew Ray Hooper from 2003 until his death in an airplane crash in June of 2006. In direct personal conversations between Mr. Hooper and the Morrises in early 2006, Mr. Hooper told the Morrises he was involved in a company generating large returns in safe and secure investments for his investors, called Engenuity. He said he had recently created the Producer Revolution to bring similar safe,

high-return investing to the masses. R. 135-136.

7. Both Mr. Hooper and the Morrises were Latter-day Saints. Mr. Hooper told the Morrises his program would help bring about "Zion on the earth." R. 136.

8. Mr. Hooper represented to the Morrises that sound, safe investing could be done with borrowed money. Mr. Hooper asked about the Morrises' home. They indicated they had nearly paid off their 15-year mortgage. He said that the investment potential for the home could approach $1 million. R. 136.

9. Mr. Hooper told the Morrises about the difference between debt and liabilities, and how borrowed money could be used to invest to create passive income to cover liabilities. R. 136.

10. The Morrises scheduled an appointment with Mr. Hooper for the middle of June of 2006 to discuss their financial and investing goals. R. 136.

11. Mr. Hooper died the week before their appointment in an airplane crash, along with his business partner Les McGuire. Dee Randall, head of Horizon Financial and Insurance, spoke at Ray Hooper's funeral and was introduced as Hooper's Personal Life Coach. Garrett Gunderson also spoke at the funeral, introduced as Hooper's business partner. Wade Sleater, a principal of Atlas Capital, was a prominent spokesman for Engenuity after the airplane crash and was identified as "CEO of Engenuity." R. 136-137.

12. Principals at Engenuity became aware of the Morrises' scheduled but unattended meeting with Mr. Hooper. R. 137.

13. An Engenuity employee called the Morrises to follow up on the information

Mr. Hooper had provided them and to set up a meeting. The Engenuity employee indicated that the Morrises should first meet with Garrett B. Gunderson, who they indicated was a partner of Mr. Hooper's and was doing initial interviews with Mr. Hooper's clients. R. 137.

14. Mr. Gunderson, Mr Hooper and Mr. Randall were partners and close business associates with intertwining dealings. Mr. Randall described Mr. Hooper as "like a son." Mr. Gunderson and Mr. Hooper were agents of Mr. Randall's and his insurance agency, Horizon Financial and Insurance Group, Inc. Messrs. Randall and Gunderson had ownership interests in the building from which their insurance business was conducted. Mr. Gunderson gave testimonials as to Mr. Randall's integrity. Mr. Gunderson stated that Dee Randall was "one of the critical people in my life. . . . He created new opportunity for me, and I don't think I would be where I am today without his direction, his guidance." All were involved as principals and participants in Engenuity, the Producer Revolution and the Curriculum for Wealth, and the affiliated or successor programs/entities, such as Freedom Fast Track. R. 137.

15. Mr. Gunderson was Horizon's main agent for northern Utah and the entire state of Nevada. Gunderson's biographical sketch notes his business expertise as a financial strategist, associated with The Producer Revolution, Engenuity, and Curriculum for Wealth. R. 137.

16. The Morrises met personally with Mr. Gunderson on July 12, 2006, at the Provo Engenuity offices located at 3520 N. University Avenue, Suite 350. R. 138.

17. At the request of the Engenuity agent, the Morrises had previously filled out and submitted to Engenuity a written financial profile, including their income, debt, and assets, in preparation for the meeting. This profile was transferred to a "PS&G" (Personal Savings and Growth) financial planning worksheet from the "LEAP" (Lifetime Economic Acceleration Process) Program. Both Mr. Gunderson and Ms. Clements were trained as LEAP financial advisers through Horizon Financial. R. 138.

18. In his meeting with the Morrises, Mr. Gunderson reiterated all of the points previously made by Mr. Hooper, including: (a) sound, safe investing could be done with borrowed money; (b) borrowing money against the equity in one's home or from 401(k) and personal retirement accounts could result in huge returns with no risk; and, (c) the risks of such borrowing could be completely offset by properly structuring the investment vehicles. R. 138.

19. Mr. Gunderson represented to the Morrises, and emphasized the point, that Engenuity had a group of highly qualified professionals to guide the Morrises through the investment program, including personal consultations and seminars. R. 139.

20. In July and August of 2006, the Morrises had several face-to-face meetings with Ms. Clements, who was an agent in Engenuity, an insurance broker with Horizon and Mr. Randall and an associate of both Mr. Hooper and Mr. Gunderson, at the Provo Engenuity offices. At the meetings, Ms. Clements reiterated and reinforced all of the representations made by Mr. Gunderson in his meeting with the Morrises. R. 140

21. At a meeting with Ms. Clements on August 8, 2006, the Morrises were

given an "Agreement of Intention" to sign among them that contained the following representation: "my [Cynthia Clements] intention in every meeting with you [the Morrises] is to co-create a financial plan that is indestructible—protecting you, your family, and your business under any and all circumstances."R. 140.

22. The Morrises were told by Ms. Clements that the pledge in the Agreement of Intention included the assistance, advice and support of all the professionals available to them through Engenuity, the Producer Revolution, and the Curriculum for Wealth, which includes all the Appellees. R. 140.

23. The Morrises attended the Curriculum for Wealth Seminar from August 10 through August 12, 2006, held at the Provo Marriott Hotel. R. 140.

24. The experts at the Seminar included Rick Koerber of Engenuity and Franklin Squires; Mr. Gunderson; Rex Wheeler, then President and owner of the Ockham Group; and Garrett White, a principal in The Investor's Paradigm. R. 140-141.

25. At the seminar, Mr. Gunderson represented that investing through a 401(k) was foolish, describing all the reasons not to do so, including the inability to pursue other investment alternatives that would offer substantially greater returns. He derided the hidden tax consequences in 401(k) investing and the fact that one was in partnership with the federal government in 401(k) investing. R. 141.

26. At the seminar, Mr. Wheeler and Mr. Koerber extolled the virtues of using one's and other people's good credit for real estate investing. R. 141.

27. At the seminar, Mr. White promoted leveraging mortgages for investment

purposes. R. 141.

28. The seminar emphasized that safe investing could be done by freeing up all one's available assets, and even borrowing against one's assets, and using various strategies to invest in real estate. R. 141.

29. In a meeting with Ms. Clements on August 22, 2006, the Morrises were told by Ms. Clements that the "holding company" to be used as their investment vehicle was Atlas Capital, LLC. Atlas Capital's offices in Provo. Utah, were directly contacted with Engenuity's offices. These entities were all billed as part of the Engenuity Network and the Producer Revolution. R. 141.

30. At the meeting, Ms. Clements said the Morrises' investment in Atlas Capital would be safe and secure. She represented that Atlas Capital was part of a conglomeration of very successful companies involved in real estate investing, marketing, satellite communications and other profitable enterprises. R. 141.

31. Ms. Clements represented to the Morrises that Atlas Capital was returning at least 3% per month on money invested in it. She helped the Morrises calculate that a 3% monthly return on $240,000 invested would provide sufficient income for the Morrises to: (a) repay the debt they incurred against their home in the transaction, (b) pay the whole life insurance policy premiums Ms. Clements recommended they buy, with her acting as the agent; and, (c) leave them some money to pay living expenses. R. 142.

32. In October of 2006, the Morrises in an email to Ms. Clements asked for written information on Atlas Capital. Ms. Clements said that the Morrises were investing

in the "producer," or individual, so "there are no summaries, etc." R. 142.

33. On October 25, 2006, the Morrises met with Kyle Nelson. Mr. Nelson represented to the Morrises that Atlas Capital invested in: (a) "hard-money lending;" (b) new business development (such as Atlas Marketing, which he represented sold satellite dishes); (c) new real estate development; and, (d) the general real estate market. Mr. Nelson confirmed that Atlas Capital returned an average of 3% per month on invested funds. Mr. Nelson represented to the Morrises that hard-money lending involved loaning to developers who needed to qualify for bank loans for real estate purchases or development. He represented that the developers had a short-term need to show the lending bank a certain amount of cash reserves. The developers were, thus, willing to pay a higher-than-normal interest rate long enough to have the money in reserve to show the lender. The developers then paid the money back when the loan closed on the property. R. 142-143.

34. Mr. Nelson represented to the Morrises that hard-money lending was risk-free and resulted in high returns to Atlas Capital, as did Atlas Capital's other business activities. R. 143.

35. The Morrises asked Mr. Nelson if he had any written material on Atlas Capital. Mr. Nelson said no, otherwise he would be "advertising" the Company in violation of securities laws. He said he and his associates worked by referral only, and they were looking into being able to offer securities, but they would be at a lower monthly rate of return. R. 143.

36. Mr. Nelson recommended that the Morrises' investment in Atlas Capital remain "unsecured," stating that if, for example, they invested in a specific property and radioactive material were found under the building on the property, their investment would be valueless. He also noted that in the Producer Revolution principles (No. 5), people are assets and things have no intrinsic value. R. 143.

37. Mr. Nelson stressed in his face-to-face meeting with the Morrises that Atlas Capital only invested in businesses and projects in which he and his associates had control. He said, for example, that Atlas Capital controlled Atlas Marketing/Atlas Dish. Likewise, Atlas Capital had hired someone who used to work for D. H. Horton, which he represented to the Morrises as the nation's largest home builder, to work with Atlas Capital in real estate development. R. 143-144.

38. The next day, following their meeting with Kyle Nelson, the Morrises met with Chandler Bello at the Investors Paradigm to take out a first and second mortgage against their home. R. 144.

39. On September 7, 2006, the Morrises met with Andrew Howell, the attorney recommended by Ms. Clements and used by other investors in the Engenuity/Producer Revolution program. Attorney Howell advised them on wills, estates, probate, and taxes. Mr. Howell created separate trusts for Morrises, emphasizing—along with avoiding probate and protecting assets from liability— that the current estate tax exemption would then be $2 million per individual ($4 million per couple). Creating a will structure for assets that would actually be impossible for the Morrises to accumulate, again, lent

credence to the entire fraudulent investment scheme. R. 144-145.

40. At a subsequent meeting with Mr. Howell on December 12, 2006, he and the Morrises talked about setting up an LLC to conduct their investment activities. Mr. Howell set up Morris Management LLC for the Morrises. R. 145.

41. The Morrises took the money they obtained from borrowing against their home and 401(k) and invested it in Atlas Capital. Mr. Howell advised the Morrises to execute the unsecured promissory note that Atlas Capital had created, in the amount of $240,000, in the name of Mrs. Morris' Revocable Trust, which they did on December 13, 2006, the day after their second meeting with Mr. Howell. Mr. Nelson signed the promissory note on behalf of Atlas Capital. R. 145.

42. Mr. Howell knew before the Morrises did that Atlas Capital was giving them an unsecured promissory note for their "investment." R. 366. Mr. Howell did not indicate his conflicts of interest in representing many of the principals and entities the Morrises were dealing with in the scheme. R. 445.

43. Ms. Clements and Mr. Gunderson were insurance agents working through Dee Randall and Horizon Financial and Insurance Group, Inc. When the Morrises scheduled appointments with Ms. Clements as their financial advisor, the receptionist answered the phones at the Provo Engenuity office with "Engenuity Life and the Producer Revolution." Ms. Clements also communicated with the Morrises via email addresses using these names interchangeably. Wade Sleater was a manager for Engenuity Life. R. 145.

44. As part of their association in the Producer Revolution, Engenuity and Horizon Financial, the Morrises subscribed to and received various newsletters, including "The Revolutionist" and "The Abundant Life." The Abundant Life Annual Client Retreats were sponsored by Horizon Financial. Presenters at Abundant Life Retreats included Ms. Clements and Mr. Gunderson of Engenuity, and Mr. White of Investor's Paradigm, now merged with Engenuity and Freedom Fast Track. R. 146-147.

. 45. The Morrises received little communication from Ms. Clements or principals and representatives of the Ockham Group through the summer of 2007, and were becoming anxious about not investing in real property to offset their income tax liability, as they had been told to do by Appellees.

46. The Morrises had a face-to-face meeting with Bobby Fogg on August 30, 2007, who represented he was Garrett Gunderson's assistant. The meeting was at the Freedom Fast Track offices, at Horizon Financial's building in Sandy, Utah. Freedom Fast Track was the successor to Engenuity. Mr. Gunderson joined the meeting. Mr. Gunderson told the Morrises that he had not authorized any new "tuitions" to be taken in Engenuity since November of 2006. Mr. Gunderson also revealed directly to the Morrises that Ms. Clements was no longer part of his "accredited network." Mr. Gunderson also told the Morrises that the Ockham Group had not performed for others as promised and so he had stopped referring people to them in January of 2007. R. 148.

47. In September of 2007 the Morrises received an email from Atlas Capital defining a new, confusing rate of return on their investment with Atlas Capital. They also

received an email indicating that the Producer Revolution was being dissolved. Atlas Capital defaulted on the promissory note payments in October of 2007. R. 149.

48. On October 31, 2007, Andrew Howell told the Morrises that unsecured investment companies are not all bad, but they should hav received a private placement memorandum and disclosure documents in connection with their investment. He told them he would refer them to independent counsel to pursue their claims. R. 347.

49. The following misrepresentations and omissions were made directly to The Morrises: (a) the fact that new investors' money was being used to pay earlier investors' returns; (b) the rates of return available to The Morrises through their investments in Atlas Capital; (c) the state of Atlas Capital's business and investments; (d) the low risks associated with investing through unsecured promissory notes; and, (e) the low risks associated with investing through borrowed money.

SUMMARY OF ARGUMENT

The trial court's decision to grant summary judgment in favor of the Appellees was incorrect and should be reversed. There are genuine issues of material fact and the Appellees are not entitled to summary judgment as a matter of law.

Appellants claim fraud, contract breach, breach of fiduciary duty and legal malpractice against Appellees in connection with a ponzi scheme, under the guise of a total financial planning package. Each of the participants in the scheme reinforced each others' vital role in the scheme. Appellants were persuaded to purchase expensive whole life insurance policies and advised to purchase real properties as investments. Appellants

had insufficient assets and income to accomplish either of these. Investible funds could only be generated if the Morrises were convinced to take out loans against their 401(k) and to take out mortgages on their home to invest with Atlas Capital, with the false promise that they would achieve a high rate of return from Atlas Capital to fund their investment program.Creation of a personal holding company and estate planning were necessary to give the illusion of limiting risk, encapsulated investments and planning for future generations. The scheme was perpetrated through continuous face-to-face meetings, seminars, and newsletters, all designed and having the effect of legitimizing the ponzi scheme.

ARGUMENT

I. The Trial Court Should Have Denied the Motions for Summary Judgment.

Summary judgment is only appropriate where there are no material facts in dispute and defendants are entitled to judgment as a matter of law.

Any showing in support of summary judgment "must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor." Bullock v. Deseret Dodge Truck Ctr., Inc., 11 Utah 2d 1, 354 P.2d 559, 561 (1960). "Only when it so appears, is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views." Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). Archuleta v. Galetka, 267 P.3d 232, 2011 UT 73, ¶ 43 (Utah 2011).

The disputed facts, if established at trial, are sufficient to prove a scheme to defraud the Morrises, similar to the one described in State v. Bolson, 167 P.3d 539, ¶¶ 2-4 (Utah App. 2007):

> In 1999, Paul Stewart began an investment scheme (the Program). Potential investors were encouraged to deposit money, usually proceeds achieved by taking out first or second mortgages on properties they owned, into the Program's escrow account. In return, the Program would pay the investors' new mortgage payments and pay the investors an unusually high percentage of interest annually. After the agreed upon time frame, usually between two and four years, investors would be able to retrieve their full investment from the escrow account. Investors were provided with written guarantees from a title guaranty company stating that the funds placed in the escrow account were held in trust and would be accessible at any time. Stewart told potential investors that the funds would not be dissipated in any way and would only serve as collateral in deals about which Stewart did not disclose many details.
>
> . . . .
>
> In reality, the Program was merely an elaborate Ponzi scheme, defined as "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments." Black's Law Dictionary 1180 (7th ed. 1999). The money collected from these later investors was never safe, as claimed by Defendant and Stewart, because it was used by the Program principals to make the payments owed to the original investors.

The material facts in dispute noted above set forth a sufficient basis for Plaintiffs' claims of fraud, contract breach, breach of fiduciary duty and legal malpractice.

CONCLUSION

The trial court's decision to grant summary judgment in favor of the Appellees was incorrect and should be reversed. There are genuine issues of material fact and the Appellees are not entitled to summary judgment as a matter of law.

I hereby certify that the Brief complies with the Type-Volume limitations of Rule 24 of the Rules of Appellate Procedure.

DATED: July 27,2016.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2016, two copy of this Brief were served by hand delivery to each of the following:

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ADDENDUM TO APPELLANT'S BRIEF

Appellate Case No. 20150604-CA

Pursuant to Rule 24(a)(11), Utah Rules of Appellate Procedure, no addendum is necessary under this paragraph.