2015

Remax Elite Dba, Hilary "Skip" Wing, Aspenwood Realestate Corporation, Plaintiffs v. Still Standing Stable, Lc, Charles "Chuck" Schvaneveldt, and Cathy Code, Defendants

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

REMAX ELITE DBA, HILARY "SKIP" WING, ASPENWOOD REAL ESTATE CORPORATION, ELITE LEGACY CORPORATION, Plaintiffs/Appellees v. STILL STANDING STABLES, LLC, CHARLES "CHUCK" SCHVANEVELDT, AND CATHY CODE, Defendants/Appellants.	Case No. 20140978-CA

APPEAL FROM THE SECOND DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
THE HON. NOEL S. HYDE, CIVIL NO. 060906802

REPLY BRIEF OF APPELLANT CHUCK SCHVANEVELDT

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REPLY ARGUMENT

I. PLAINTIFFS' OPPOSITION TASKS THIS COURT WITH MULTIPLE REQUESTS TO DEPART FROM ITS ROLE, UNDERSCORING FATAL FLAWS IN THEIR POSITION CAUSED BY INACTION BELOW.

Plaintiffs in their Response would require that this Court take a series of actions in order for them to prevail. This demonstrates their concession of fatal errors they made below. They would have this Court:

- Reopen the district court proceedings in order to amend the caption to remove the reference to the dba (Response Brief at 40);
- Reopen the case in order for the district court to consider new theories that were not pled (such as mutual mistake)(Response Brief at 38);
- Consider the merits of the underlying argument, not raised in the pleadings as a count or affirmative defense, that a third party franchisor (Remax International) would have disapproved of Still Standing Stables owning the dba (Response Brief at 42-43);
- Reopen the case to allow the Complaint to be amended to cure Plaintiffs' violation of the dba statute (Response Brief at 41);
- Impose a novel theory, not raised below, that Quinlan had some sort of agency-derived equitable duty to transfer any benefits he realized by seeking a commission to Wing or Aspenwood. (Response brief at 46);

- Mandate that the case be reopened in order to allow Plaintiffs to "recover[] and properly register[]" the dba (Response brief at 42)(thereby introducing "another round of litigation");

- Repudiate Still Standing Stables' ability to own the dba under the dba registration statute based on conjecture and not on evidence in the record (Response Brief at 42-43).

None of these requests fits within the purpose of an appeal. They demonstrate both a misconstrual of this court's purpose and the failure to raise and preserve issues below.

II. SCHVANEVELDT HAS SUCCESSFULLY PRESERVED EVERY ISSUE PRESENTED IN HIS BRIEF AND HAS APPEALED FROM ALL POSTTRIAL MOTIONS.

Plaintiffs raise a variety of threshold matters relating to the standard of review and preservation of issues on appeal. None of them obtain.

In their recitation of the procedural history, Plaintiffs set forth a variety of post-trial motions relating to the issue of standing. In so doing, they claim that these matters were not appealed. This is an appeal from denial of a Rule 60(b) motion, so what happened regarding post-trial motions may seem gratuitous. However, Plaintiffs' allegation is so fundamentally flawed that it must be addressed. A related appeal, 20130746-CA, is now pending before this Court. That appeal is from the district court's underlying rulings, including the district

court's denial of standing arguments, both pre- and post-trial. Standing was raised nearly from the beginning of the case, and continued to arise into the post-trial phase. There is thus no basis for Plaintiffs' contention that Schvaneveldt has not appealed the various standing motions.

Finally, Plaintiffs claim that issues surrounding the rule 60(b) motion were not preserved on appeal. Specifically, Plaintiffs argue that various cases, administrative law standards, and other authority were not raised below. They also argue that the thread of the arguments supporting each of the separate sections of rule 60(b) differs from that offered by Schvaneveldt below. Response Brief at 27-28.

Arguments are distinct from issues. Issues are required to be preserved, not specific arguments that tend to support those issues. To preserve an issue, "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." *Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366, 373. Plaintiffs do not dispute that Rule 60(b)(4), 60(b)(5), and 60(b)(6)[1] were raised below as issues, together with supporting (voluminous) argument and evidence. This satisfies *Pratt*. Page limits, plenary record review, and other factors on appeal often lead to arguments

[1] Plaintiffs argue that Schvaneveldt never specifically sought relief under Rule 60(b)(3), which he clearly did. (R. 7292).

changing complexion on appeal. This is not novel, and does not affect preservation. Thus, Plaintiffs' contention that the Rule 60(b) issues were not adequately preserved is meritless.

III. PLAINTIFFS ERR IN ATTEMPTING TO IMPOSE A DUTY ON SCHVANEVELDT TO HAVE ACTED MORE PROMPTLY; THEY SIMPLY ASSUME AWAY SCHVANEVELDT'S NARRATIVE THAT THEY CONCEALED QUINLAN'S ROLE.

Plaintiffs repeatedly argue that Schvaneveldt's evidence concerning Quinlan's role was not timely presented, and could have been offered earlier. Response Brief at 30. The narrative in Schvaneveldt's brief states otherwise. Wing's insistence that he was not liable for attorney fees began to reveal Quinlan's role, allowing Schvaneveldt to "connect the dots." Rather than address this narrative head-on, Plaintiffs justify the district court's rulings by invoking facts that simply no longer exist. For example, they continue to assert that the dba's status was plain to see in the registration repository, yet they rely on their own "corrective" filings, showing an assignment from Quinlan, that would throw anyone off the scent that none of Plaintiffs owned the dba.[2] They argue, in essence, that Schvaneveldt should not have been fooled by their duplicity.

[2] One of Plaintiffs' contentions proves too much. They argue that since Quinlan had resigned his broker's license in July, 2005, no broker could have sued for the commission. Response Brief at 37. So be it. That means that no one could sue for a commission. The lesson to brokers and agents is to be cautious with such formalities—they matter, and the consequences of not doing so can be expensive (lost commissions).

Plaintiffs' failure to offer any credible counter-narrative demonstrates that they have no answer to their concealment now being exposed.

IV. THE PLAINTIFFS LACK STANDING TO SUE FOR THE REAL ESTATE BROKER COMMISSION.

a. Summary of Primary and Responsive Arguments.

In his opening brief, Schvaneveldt argued that the Plaintiffs lacked standing to bring an action to enforce the FSBO agreement. Only a principal broker can seek a real estate commission, and none of the Plaintiffs were or had been a principal broker. Indeed, a stranger to the transaction and the lawsuit, Dale Quinlan, was the licensed broker and owner of the dba ReMax Elite (the only enumerated party to the FSBO). Quinlan later assigned his interest in the dba to Still Standing Stables, LLC, and that entity settled, mooting the case. The issue of standing was raised early in the proceedings, and thus Schvaneveldt argued that this issue should be reviewed for correctness. Some of the information concerning standing and mootness was developed post-trial, prompting Schvaneveldt to file for relief under U.R.C.P. 60(b).

In response, the Plaintiffs challenge the standard of review. Because a portion of the evidence raised to support Schvaneveldt's standing argument was offered after trial, and some evidence creating mootness developed after trial, Plaintiffs argue that a JNOV post-trial standard of review should be employed. Plaintiffs next contend that the assumed name statute does not bar them from

pursuing the action, and that any failure to comply with the statute may still be cured. Plaintiffs next contend that their due process rights would be violated were the Quinlan and Department of Commerce evidence relied upon to deny standing. Finally, Plaintiffs contend that granting Rule 60(b) relief would violate public policy.

b. The District Court's Refusal to Consider Standing and Mootness Under Rule 60(b) Should be Reviewed for Correctness.

Plaintiffs contend that the evidence concerning Quinlan's ownership of the dba ReMax/Elite was raised, in part, post-trial, and thus is subject to a heightened standard of review. They further argue that the assignment evidence was developed post-trial, thus further justifying a heightened standard of review. Their argument fails. The evidence demonstrates that the acquisition of the dba by Still Standing Stables, LLC, and subsequent settlement, has mooted the issue of whether Plaintiffs have standing. The matter is conclusively resolved, inasmuch as Still Standing's acquisition of the dba indisputedly and finally merges any standing that Plaintiffs may claim to purse the commission.

The acquisition of the dba is claimed by Plaintiffs to be somehow inappropriate. However, the acquisition of a judgment or enforcement rights by one entitled to enforce them is routine. *See, e.g., Lamoreaux v. Black Diamond Holdings*, 2013 UT App 32, ¶22, 296 P.3d 780. The effect of such an acquisition is to effect a merger of the claimant with the claimee, thus rendering further

prosecution of the claim moot. There is nothing inappropriate in Still Standing's acquisition of the dba. Indeed, to protect its rights, Still Standing could be expected to do no less than acquire the dba if it was available. It is incorrect to employ a heightened standard of review on the application of law to facts that moot an issue. Issues of mootness are reviewed for correctness. *Tillotson v. Meerkerk*, 2015 UT App 142, ¶5, 353 P.3d. 165.[3] More important, standing raises both constitutional and jurisdictional implications, *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983), which are threshold legal issues.

The proper standard of review on this issue is, therefore, correctness, either under the standard of review for mootness or for standing in general. *Jones v.*

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[3] Plaintiffs rely on *Brown v. Div. of Water Rights,* 2010 UT 14, ¶15, 228 P.3d 747, a case dealing with agency review of an action where future injury was alleged in a pleading. The Utah Supreme Court was very specific that it was addressing the nature of future injury in the context of pleadings, and whether simply pleading a future injury was sufficient to establish standing. The court used limiting language in its ruling, stating that it was addressing the proper standard of review in "future injury cases." *Brown* ¶19. This conclusion is bolstered by *Brown*'s express reliance on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a case in which the Supreme Court of the United States clarified the standing requirements for environmental litigants whose actual injury had not yet materialized.

This is not a future injury case. Schvaneveldt's injury--being subject to a claim by one not authorized to bring it--is fully realized. The district court acknowledged this by ruling at one point, in Schvaneveldt's favor, that Shea lacked standing to claim a commission because Shea was not a broker. (R. 1885).

Moreover, standing was not raised for the first time post trial. It was raised early in the proceedings at summary judgment, and thus, even under Plaintiffs' interpretation of *Brown*, the issue of standing enjoys the inferences attendant to that timing.

Barlow, 2007 UT 20, ¶10, 154 P.3d 808. It is thus inappropriate to make the series of inferences and leaps suggested by Plaintiffs in their discussion of the evidence surrounding standing. It is also improper for Plaintiffs to criticize Schvaneveldt for failing to raise the standing issue in trial testimony, since the district court had already ruled against Schvaneveldt's attempts to challenge standing, R. 8382 at pp. 77-80 (as a matter of law Plaintiffs were entitled to collect a commission), and the assignments mooting the standing issue had not yet occurred. In this respect any contention that the standing argument was abandoned, Response Brief at 30, is incorrect.[4]

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[4] Related to the issue of the standard of review is Plaintiffs' contention that the district court made factual findings in connection with its refusal to grant the Rule 60(b) motion. Response Brief *passim*. This is incorrect. Plaintiffs fundamentally misconstrue the task of the district court. The district court, in refusing to consider the motion, may have set forth its basis for refusing to do so (timeliness, duplicativeness), but it did not make any findings in this regard. Findings are made only after evidence is considered and weighed. That did not occur here. Also, and relatedly, Plaintiffs contend that none of the evidence relating to Quinlan may be considered by this Court on appeal since it was never admitted into evidence. Response Brief at 26. Again, Plaintiffs misconstrue the applicable standard. The evidence supporting the rule 60(b) motion is a part of the record, and the question is whether the district court's refusal to consider it violated the constitutional and jurisdictional threshold matter of standing and mootness. A district court may not refuse to consider a standing or constitutional issue and render it nonappealable simply by refusing to consider evidence in support of the standing argument. Moreover, Plaintiffs fail to heed their own counsel, having attached extra-record material to a previous brief in a related appeal touching on one of the issues raised in their Response here, the role of Remax International. Response Brief in 20130746-CA.

c. *Plaintiffs Are Not, and Never Have Been, Compliant With the Registered Name Statute.*

Plaintiffs argue that Aspenwood did not need to properly register the ReMax Elite dba since neither it nor Wing conduct business any longer. Plaintiffs' theory is that even though the dba needed to be registered to conduct business, it did not need to be registered to sue for a commission. Moreover, they argue, as long as the dba was registered with someone (Wing, or even Quinlan or Still Standing, presumably), this was sufficient for technical compliance with the statute.

This argument is fundamentally flawed, for two reasons. First, the relevant time period concerning the failure of dba compliance was at the time of the transaction and the time suit was initiated, not now. Relatedly, the time to cure an improper dba registration was during the pendency of the action, not now, after judgment has been issued. *Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, 979 P.2d 363.[5]

Second, the fact that Aspenwood is winding up does not mean it no longer exists. This pending litigation, as admitted by Plaintiffs, is but one factor demonstrating that it continues to do business in a limited fashion, and thus the registration requirements continue to apply. The fact of winding up, moreover,

[5] The dba expired before trial. (R. 6857-59). Maintenance of an action by a dba requires contemporaneous compliance, not compliance in the past. Contemporaneous compliance by an expired dba was not possible.

does not absolve principals of the corporation from liability to the degree they have received distributions, or benefit in the future from the chose in action represented by this suit. Utah Code Annot. § 16-10a-1408.

Plaintiffs essentially concede that they did not properly register and maintain the dba, but that this failure was excusable. (Ironically, though, Wing is now trying to capitalize on this failure to avoid liability, and his attempts to do so were the catalyst for bringing the Rule 60(b) motion in the first place.) As for excusability or cure, Plaintiffs cite no case law for this proposition, but rather rely on a strained reading of the statute, focusing on its use of the passive voice: the statute requires that it be "complied with." They argue that if Shea was really representing Quinlan, the statute was "complied with" by *somebody*, even if it was not Plaintiffs.

Plaintiffs thus contend that as long as Shea had a broker, any broker, the transaction was valid. But that "somebody" could not assert contractual rights when the party to the contract was dba ReMax Elite.

Plaintiffs discount the dba's role, for two reasons. First, they cite the novel principle that someone besides Shea or the owner of the dba (which they concede was Quinlan (Response Brief at 21, 43)) could be the contracting party. This argument violates basic principles requiring construction of contractual texts based on their express language. The dba was the contracting party based on the express

text of the document (FSBO ¶2, R. 8136), and, *a fortiori*, its sole registered owner, Quinlan, was a party to the FSBO. Second, the argument misconstrues agency law, which allows agents to act for their principals even if the principal is not contemporaneously aware of every detail of the agent's actions (as long as the agent is acting within the scope of its agency). *See generally* 3 AmJur 2d Agency § 73 at 487 ("An agent has the implied authority to do business on the principal's behalf in accordance with the general custom, usage, and procedures in that business. The fact that the principal is not aware of the exact character of the customer usage is not material if he or she has noticed that usages of such nature may exist."). Plaintiffs' argument undermines the very reason for having agents do detail work for their principals. Shea was acting as an agent of dba Remax Elite, owned by Quinlan, or he was acting for nobody at all (as Plaintiffs contend, Response brief at 37). Either way, no commission could be sought.[6]

Apart from being disconnected with basic contractual and agency principles, Plaintiffs' argument is impossible to reconcile with the statute's clear language.

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[6] Plaintiffs' misunderstanding of the brokerage law is emphasized by their stating that Shea earned a commission. Response Brief at 38. He did not. Rather, the brokerage owning the dba earned the commission. A brokerage in such a situation then may or may not have an obligation to the agent to share it, depending on their independent contractual relationship. Plaintiffs also cite the wrong brokerage statute, citing to the 2015 version and not to that applicable at the time. Utah Code Annot. § 61-2-10 (1996). That statute prohibits dual brokerage, which is the very concept Plaintiffs seem to argue that Shea employed (being an agent of both the dba and Wing at the same time).

While notice to the public is a salutary cited purpose of the statute, argument, it is not a stated purpose in the statute's language. The language controls, and no inferred "intent" can derogate therefrom. Compliance with the express text is what matters, not the historical context from which the statute arose, or any judicial gloss on that context.

Apart from the counterintuitive nature of Plaintiffs' argument, the record demonstrates, through the Quinlan and other evidence, that the Plaintiffs' claimed ownership of the dba through their purported transfer from Quinlan was void ab initio. (R. 8123, 8129). This in and of itself unhinges Plaintiffs' already overstretched argument for compliance.

d. The Registered Name Statute Does Not Allow the Plaintiffs to Now "Cure" Their Failure to Comply.

Plaintiffs next attempt to create an environment in which they can cure their noncompliance. None of what they argue on this point comes from the record. Rather, it is offered as a hypothetical future way forward, and suggests a variety of tasks for this Court to do to forward their cause, none of which is countenanced under the law. *Supra* pp. 1-2. Moreover, Plaintiffs cite no cases or other authority indicating that the statute authorizes the type of *nunc pro tunc* cure they advocate.

Plaintiffs then cite to ReMax corporate policy (again, not in the record) prohibiting dbas using the ReMax name without corporate permission. This extra record contention should not be considered.

Plaintiffs' final argument on this point echoes its prior assertion that the dba statute's intent is to protect the public. This time Plaintiffs argue that the statute should be used offensively, against Still Standing Stables, which is not a real estate broker, in order to avoid public deception. This argument completely misconstrues *Black Diamond*, *supra* p. 6, which allows for assignment of choses in action and acknowledges how mootness can arise out of such assignment. *See Tillotson, supra* p. 7. Mootness supersedes any challenge to registration.

Plaintiffs' argument also ignores the fact that Quinlan is the true owner of any commission claim, under the express language of the dba statute. As noted *supra* pp. 9-13, public protection may be a cited basis for the statute, but the statute's express language controls, and that language, properly construed, allows Still Standing Stables to be a proper assignee of the dba. The statute merely requires the dba to state its purpose in this application, not the owner's corporate documents. Moreover, upon proper registration, there is no public deception. The statute prohibits the notion of an undisclosed principal, and registration makes disclosure.

e. Due Process is Not Violated When One is Denied Discovery When One Prevails, and Allowing for Rule 60(b) Relief Will Not Violate Public Policy

Finally, Plaintiffs raise a series of policy and due process arguments concerning the Quinlan evidence. Plaintiffs make a glaring omission in their

contentions: they did not have an opportunity to test the evidence or to conduct discovery because the district court dismissed the arguments on which the evidence was based as a matter of law. Plaintiffs could have challenged below the evidence and dispositions they dispute (such as the agency action) and chose not to. Moreover, the Plaintiffs are the ones who successfully induced the district court to bar Schvaneveldt from presenting standing issues to the jury and from considering the evidence presented supporting the Rule 60(b) motion. One does not suffer a denial of due process when one is granted the very relief one seeks.

Plaintiffs finally argue that public policy prohibits final judgments to be reversed based upon untimely evidence, namely, the Quinlan evidence. Ironically, the very public policy argument that plaintiffs invoke, they violate. They would urge this court to reopen the district court case in order to clarify the precise role of the dba, up to and including changing the caption of the case. *See supra* pp. 1-2. Plaintiffs pay lip service to public policy and notions of finality only when it suits them.[7]

[7] To further the irony, standing has both constitutional and jurisdictional implications. The Utah Supreme Court has held that the state constitution mandates certain standing requirements emanating from the principle of separation of powers. Accordingly, in Utah, as in the federal system, standing is a both a constitutional matter and a jurisdictional requirement. *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983). These are the highest policy concerns, and thus warrant thoughtful consideration.

CONCLUSION

For the reasons set forth above and in his opening brief, Appellant Schvaneveldt respectfully requests that the Rule 60(b) rulings of the district court on standing and mootness be reversed.

DATED this 18th day of November, 2015.

CHRISTENSEN & JENSEN, P.C.

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of November, 2015, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT CHUCK SCHVANEVELDT** were mailed, first-class postage prepaid, to:

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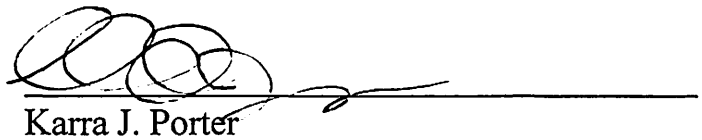

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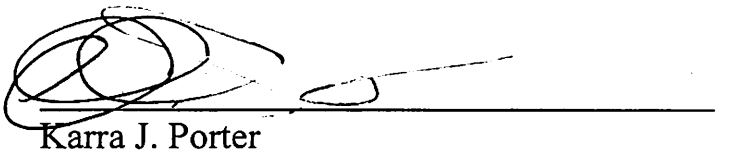
CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 3,645 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



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