

2019

**AL-IN PARTNERS, LLC, a Texas limited liability company, and
BRADLEY DIXON, an individual, Plaintiffs/Appellees, v.
LIFEVANTAGE CORPORATION, a Colorado corporation Defendant/
Appellant. : Brief of Appellant**

Utah Supreme Court

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FEB 03 2020

IN THE SUPREME COURT OF THE STATE OF UTAH

AL-IN PARTNERS, LLC, a Texas
limited liability company, and
BRADLEY DIXON, an individual,

Plaintiffs/Appellees,

v.

LIFEVANTAGE CORPORATION, a
Colorado corporation

Defendant/Appellant.

Appellate Case No. 20190565-SC

BRIEF OF APPELLANT

**ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
Trial Court Case No. 170907711
Honorable Andrew H. Stone**

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PARTIES

All parties to this action are listed in the above caption.

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INTRODUCTION

In its simplest terms, this appeal is about whether an oral express waiver is sufficient to waive the parties' agreement that waiver can only occur in writing. Here, the parties specifically agreed waiver of a contractual right can only occur if in writing by an authorized officer of the Company (the "Unwritten-Waiver" clause). However, Plaintiffs/Appellees ("Plaintiffs")¹ nonetheless seek to pursue claims that on their face require the conclusion that Defendant/Appellant LifeVantage ("LifeVantage") waived the Unwritten-Waiver clause by an alleged oral waiver.

The relevant underlying facts are relatively simple. After Plaintiff Bradley Dixon obtained ownership in more than one distributorship in violation of the parties' agreement, LifeVantage exercised its right to terminate. Plaintiffs sued, including for breach of contract and declaratory relief, based on a theory that LifeVantage waived its right to terminate should a distributor own more than one distributorship. They alleged waiver based on an oral communication. LifeVantage moved to dismiss arguing the contract specifies that waiver can only occur in a writing by an authorized officer. The trial court denied LifeVantage's motion based on its interpretation of two opinions of this Court: *Calhoun v. Universal Credit Co.*, 146 P.2d 284 (Utah 1944), and *Mounteer Enters., Inc. v. Homeowners Ass'n for Colony at White Pine Canyon*, 2018 UT 25, 422 P.3d 809. The trial court found that Utah law permits an express oral waiver of an Unwritten-Waiver Clause. This Court granted LifeVantage's Petition For Permission to Appeal From Interlocutory

¹ Plaintiffs are Bradley Dixon and an entity, Al-In Partners, LLC, that held the terminated distributorship that is the subject of the underlying Amended Complaint. (R.00219–20.)

Order.

This Court's decision in *Mounteer* makes clear that Utah law recognizes the parties' freedom to determine what conduct will amount to waiver of rights under the parties' agreement. 2018 UT 23, ¶ 19, 422 P.3d 809, 813. *Mounteer* states "if the specific language of the antiwaiver clause expressly precludes parties from construing certain conduct as a waiver of contractual rights, courts must enforce this provision as part of the parties' agreement." 2018 UT 23, ¶ 19. The trial court found that this Court intended *Mounteer* to only apply to cases of implied waiver, and that *Calhoun* still stands for the proposition that the parties cannot by contract agree on how express waiver can occur.

This Court should clarify that *Mounteer* applies to both express and implied waivers, reverse the trial court's denial of LifeVantage's motion to dismiss, and remand to the trial court with instructions to grant LifeVantage's motion to dismiss Plaintiffs' breach of contract and declaratory relief claims.

STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW

Issues:

- (1) Whether this Court's decision in *Mounteer Enters., Inc. v. Homeowners Ass'n for Colony at White Pine Canyon*, 2018 UT 25, 422 P.3d 809, affected or altered the standard set forth in *Calhoun v. Universal Credit Co.*, 146 P.2d 284 (Utah 1944), or whether *Calhoun* otherwise should be reconsidered.
- (2) Whether courts must enforce a provision of a parties' agreement that precludes construing express conduct as a waiver of contractual rights.

Standard of Review: Interpretation of binding case law presents a question of law,

which is reviewed for correctness. *Utah Dept. of Transp. v. FPA West Point, LLC*, 2012 UT 79, ¶ 9, 304 P.3d 810, 813.

Preservation: This issue was preserved through (a) Defendant’s March 29, 2018 Motion to Dismiss First Amended Complaint and the Reply thereto; (b) Defendant’s oral argument at the May 30, 2019 hearing; and (c) the trial court’s Interlocutory Order.

STATEMENT OF THE CASE

1. Facts

LifeVantage manufactures wellness products and markets and sells its products to consumers through a network of independent distributors. (R.00221.) Each independent distributor enters into a contractual relationship with LifeVantage by signing the LifeVantage Distributor Application and Agreement, which incorporates the LifeVantage Distributor Policies & Procedures (“P&Ps”). (R.00228, 00230, 00278, 00308.) In 2009, the parties entered into such an agreement that included express provisions governing the ownership of multiple distributorships, when LifeVantage is permitted to terminate a distributorship, and when waiver of LifeVantage’s rights may occur. (R.00226, 00230, 00279, 00309.)²

In Section 2.6 of the P&Ps, the parties expressly agreed LifeVantage “never gives up its right to insist on compliance with the Agreement” (the “Antiwaiver” provision) and waiver of a contractual right can only occur in writing by an authorized officer of

² Section 4.4 of the P&Ps prohibits a distributor from owning more than one LifeVantage distributorship. (R.00228, 00281, 00311.) Section 14 of the P&Ps permits LifeVantage to terminate a distributorship when a distributor has breached a provision of the P&Ps. (R.00226, 00297–98, 00332–33.)

LifeVantage (the “Unwritten-Waiver” clause). (R.00279, 00309.) The Antiwaiver provision provides:

The Company never gives up its right to insist on compliance with the Agreement No failure of LifeVantage to exercise any right of power under the Agreement or to insist upon strict compliance by an Independent Distributor with any obligation or provision of the Agreement, and no custom or practice of the parties at variance with the terms of the Agreement, shall constitute a waiver of LifeVantage’s right to demand exact compliance with the Agreement. . . . LifeVantage’s waiver of any particular breach by an Independent Distributor shall not affect or impair LifeVantage’s rights with respect to any subsequent breach Nor shall any delay or omission by LifeVantage to exercise any right arising from a breach affect or impair LifeVantage’s rights as to that or any subsequent breach. . . .

(R.00279, 00309.) The Unwritten-Waiver clause states:

Waiver by LifeVantage can be affected only in writing by an authorized officer of the Company.

(R.00279, 00309.)

After agreeing to the terms of the P&Ps, Dixon obtained ownership in more than one distributorship—Distributorships 101982 and 101987—contrary to his obligations under Section 4.4 of the P&Ps. (R.00221–22, 00223–25.) In correspondence dated November 11, 2016, LifeVantage terminated Distributorship 101987, referencing Section 4.4 of the P&Ps, which prohibits a distributor from owning more than one LifeVantage distributorship.

(R.00229.) Plaintiffs allege LifeVantage waived Section 4.4 of the P&Ps based on an oral communication. (R.00230–31.)

2. Procedural History and District Court Disposition

Plaintiffs filed their First Amended Complaint on February 20, 2018, bringing claims for declaratory relief, breach of contract, breach of covenant of good faith and fair dealing,

and promissory estoppel. (R.00219–35.) Plaintiffs alleged LifeVantage waived its right to enforce Section 4.4 of the P&Ps—the restriction on ownership of more than one distributorship. (R.00230–31.) On March 29, 2019, LifeVantage filed a Motion to Dismiss the First Amended Complaint (“Motion”),³ arguing Plaintiffs failed to allege facts sufficient to support waiver because, pursuant to Section 2.6 of the P&Ps, they expressly agreed that LifeVantage “never gives up its right to insist on compliance with the Agreement,” and, more importantly, that waiver of a contractual right can only occur if in writing by an authorized officer of LifeVantage. (R.00256–344.)

After the Motion was fully briefed but before oral argument, the Utah Supreme Court issued its opinion in *Mounteer*. LifeVantage filed a Notice of Supplemental Authority to bring *Mounteer* to the trial court’s attention. (R.00431–41.) Ruling from the bench at the conclusion of the March 30, 2019 hearing, the trial court limited *Mounteer* to cases involving implied waiver, and found that this Court’s decision in *Calhoun* required the trial court to not enforce the parties’ Unwritten-Waiver clause. (R.00538–41.) The Motion was denied as to the breach of contract and declaratory relief claims on this basis. (R.00538–41, 00459–60.)

SUMMARY OF ARGUMENT

At the heart of this appeal is the question of whether parties to an agreement are free

³ Granting LifeVantage’s Motion in part, the district court dismissed Plaintiffs’ breach of covenant of good faith and fair dealing and promissory estoppel claims on grounds unrelated to this appeal. (R.00538–42, 00459–60.) The only remaining claims—and those subject to this appeal—are Plaintiffs’ claims for breach of contract and declaratory relief.

to agree when express waiver of a contractual provision can occur, or more specifically: in Utah is an unwritten-waiver provision enforceable? It cannot be disputed that permitting *oral* waiver of a provision stating waiver must occur *in writing* is to deem it unenforceable and of no meaning or effect. LifeVantage asks this Court to conclude that the jurisprudence underlying *Mounteer*, and the *Mounteer* ruling itself, recognize that, barring unconscionability or other equitable attack, courts must enforce contracting parties' agreements as to what conduct constitutes waiver, even in the case of express waiver.

ARGUMENT

The Parties' agreement makes clear that LifeVantage has the right to terminate Plaintiffs' distributorship if two distributorships are owned. (R.00226.) The Agreement also includes two distinct waiver provisions: (1) the Antiwaiver provision that indicates LifeVantage never waives its ability to enforce its rights under the agreement, and (2) the Unwritten-Waiver clause—stating that waiver by LifeVantage can only occur when in writing by an authorized officer of the Company. (R.00279, 00309.) On its face, the Amended Complaint does not state a claim for breach of contract or declaratory relief unless LifeVantage can be found to have waived all three of the provisions identified above.

(R.00279, 00309.)⁴

⁴ As the underlying motion is brought under Rule 12(b)(6) of the Utah Rules of Civil Procedure, it is important to note that to prevail LifeVantage must show that, challenging the adequacy of the Amended Complaint on its face, Plaintiffs have failed to properly state a claim on which relief can be granted. *See Archuleta v. St. Mark's Hosp.*, 2009 UT 36, ¶ 5, 238 P.3d 1044. In considering such a motion, the court must accept the plaintiffs' factual allegations to be true, but "need not accept extrinsic facts not pleaded nor [. . .] legal conclusions in contradiction of the pleaded facts." *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999. In ruling on a motion to dismiss, a court may

It is settled Utah law that waiver is an intentional relinquishment of a known right, that “[c]ourts do not lightly consider a contract provision waived,” and that the “otherwise-breaching party [must] show that the other party intentionally waived its rights under the contract.” *Mounteer*, 2018 UT 23, ¶¶ 17–18. A waiver can be express or implied from a party’s conduct, but it must be clearly and distinctly made. *Id.*

Importantly, the *Mounteer* decision makes clear that waiver of each provision of an agreement must be considered individually (here, the underlying provision prohibiting dual ownership, the Antiwaiver provision, and the Unwritten-Waiver clause), and that waiver of the underlying provision does not amount to waiver of the other two. *Id.* at ¶ 21 (This heightened burden requires “a party asserting waiver in the face of an antiwaiver clause [to] establish ‘a clear intent to waive both the [antiwaiver] clause and the underlying contract provision.’ And this second waiver must meet the same standard as waiver of the underlying provision—there must be an intentional relinquishment of that right.”). In other words, if a party takes action that would amount to waiver of the underlying provision (such as agreeing to ownership of two distributorships), the party asserting waiver must additionally and separately show that the waiving party intentionally waived the other

“consider documents that are referred to in the complaint and [are] central to the plaintiff’s claim, regardless of whether such documents were actually included with the complaint.” *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172, 1174 (citation and quotation marks omitted). Thus, where a litigant references an agreement, the court is not required to accept Plaintiffs’ pleaded interpretation of the contract as correct but instead is permitted to look beyond the four corners of the Amended Complaint to examine the underlying contract and interpret the same. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226, 1231.

provisions (the Antiwaiver and Unwritten-Waiver clauses) as well.

Citing *Williston on Contracts*, this Court in *Mounteer* noted “[a]ntiwaiver provisions aim to give contracting parties flexibility in enforcing their rights under the contract—enforcement that would often be to the detriment of the other party—without ‘result[ing] in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable.’” *Id.* at ¶ 19 (citing 13 *Williston on Contracts* § 39:15 (4th ed. 2018)). “So if the specific language of the antiwaiver clause expressly precludes parties from construing certain conduct as a waiver of contractual rights, courts must enforce this provision as part of the parties’ agreement.” *Id.* Accordingly, waiver of the underlying provision alone is not sufficient to amount to a waiver of the Unwritten-Waiver clause “because the failure to insist on performance after breach is entirely consistent with the rights set out in the antiwaiver provision—rights of flexibility that often benefit the otherwise breaching party[,] . . . [a]nd a finding of waiver in such circumstances would thus render the antiwaiver provision meaningless.” *Id.* at ¶ 24.⁵

⁵ *Mounteer*’s ruling is consistent with the constitutional right of freedom to contract, which is both a liberty and a property right protected by due process. *See Standard Oil Co. of New Jersey v. United States*, 31 S.Ct. 502, 516, 221 U.S. 1, 62 (1911); *see also* 16B Am. Jur. 2d Constitutional Law § 641 (same). This Court has repeatedly affirmed that “[p]ersons dealing at arm’s length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain.” *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49, ¶ 38, 285 P.3d 1193, 1202 (quoting *Biesinger v. Behunin*, 584 P.2d 801, 803 (Utah 1978)). “It is not [the court’s] prerogative to step in and renegotiate the contract of the parties.” *Id.* (quoting *Peck v. Judd*, 7 Utah 2d 420, 326 P.2d 712, 717 (1958)). “Instead, unless enforcement of [the contract] would be unconscionable, [courts] should recognize and honor the right of persons to contract freely and to make real and genuine mistakes when dealings are at arm’s length.” *Utah Transit Auth. v. Greyhound Lines, Inc.*, 2015 UT 53, ¶ 31, 355 P.3d 947, 956 (quoting *Commercial Real Estate Inv.*, 2012 UT at ¶ 38).

On the plain terms of *Mounteer*, the trial court should have granted LifeVantage’s Motion to Dismiss because there was nothing before the court that could amount to an intentional waiver by LifeVantage of the Unwritten-Waiver clause. (R.00219–35.) Importantly, there is no allegation of a writing by an authorized officer of the company indicating that LifeVantage intended to waive any of the agreement’s provisions. (R.00219–35.)

Oral argument on LifeVantage’s motion focused on this Court’s recent decision in *Mounteer*, with the trial court’s interpretation relying on a singular citation to *Calhoun* (without parenthetical, reasoning or explanation) for the unremarkable proposition that “express waiver of a contractual right is sufficient to waive both [the underlying provision and the antiwaiver provision].”⁶ *Mounteer*, 2018 UT 23, ¶ 23. While *Mounteer* was silent on the issue, the trial court focused on the existence of an unwritten-waiver clause in *Calhoun* and how the *Calhoun* Court ignored it when finding express waiver.⁷ On this basis alone (after acknowledging that *Mounteer* does not mention the unwritten-waiver clause in

⁶ The *Calhoun* opinion involved a car loan. 146 P.2d 284, 285–86 (Utah 1944). The borrower had notified the company that he expected to be inducted into the army and, in response, the company “told [him] that he might have some time” to sell the car and get his equity out of it. *Id.* Two weeks later, the company exercised its contractual right to repossess the car after the buyer failed to sell the car or make a timely payment. *Id.* The contract contained an antiwaiver provision which stated that acceptance of late payments “shall not constitute a waiver of any other subsequent breach or default or prevent seller from immediately pursuing any or all of its remedies.” *Id.* at 286. The *Calhoun* Court held that the loan company expressly waived both its right to strictly enforce the payment due dates and the antiwaiver provision by its statements. *Id.* at 287.

⁷ The *Calhoun* contract provided that “no waiver of or change in the terms of this contract shall be binding . . . unless evidenced by writing signed by the parties.” However, the *Calhoun* court did not meaningfully address this clause.

Calhoun or its enforceability in the face of an express or implied waiver), the trial court concluded that the reasoning of *Mounteer* (including ¶¶ 17–22) has no application where waiver is express, and thus an unwritten-waiver clause does not preclude oral waiver, so long as it is express. (R.00538–41.) In its own words, the trial court explained:

I don't have any problem with the concept that *Mounteer* establishes a fairly high burden of proof for plaintiffs seeking to prove waiver of a provision and separately to prove waiver of the antiwaiver provisions; and for that matter, in this case, to prove waiver of the requirement that any waiver be made in writing by an officer. That's a high burden. But *Mounteer* also appears to draw a distinction between sins of omission and sins of commission. That is conduct where a breach is allowed to proceed versus affirmative conduct by a party - - a contracting party that affects its rights under the contract. And it's for that reason I look at the paragraph citing to *Calhoun*, where *Mounteer* leaves untouched the holding that an express waiver of one provision waives the antiwaiver provision, as well. Doesn't mention in *Mounteer* the effect on a requirement that a waiver be made in writing. But it does cite with *Calhoun*. And *Calhoun* actually did involve the provision that not only had an antiwaiver provision but also a requirement that waiver be made in writing by an officer. And *Calhoun* ignored that.

(R.00539–40.)

However, a reading of *Mounteer* demonstrates its citation to *Calhoun* was simply intended to reaffirm the general law on express waivers in Utah, rather than to erase over 70 intervening years of contractual jurisprudence on which the Utah Supreme Court based its ultimate holding in *Mounteer*.⁸ See *Mounteer*, 2018 UT 23, ¶¶ 17–22. Whether express or

⁸ Were *Calhoun* considered today in light of the decades of decisions on contractual law generally and waiver law specifically, a court would enforce the parties' agreement as written, requiring not only evidence of an intentional relinquishment of the underlying provision, but also of both the anti-waiver provision and unwritten-waiver clause as this Court articulated in *Mounteer*. Importantly, this Court's decisions do not identify every previous opinion intended to be modified thereby. Instead, Utah law is set by the most recent opinion of this Supreme Court and all prior opinions that materially differ are no longer controlling. See, e.g., *State ex rel. Auto. Emporium v. Murchison*, 289 Or. 673,

implied, *Mounteer* makes clear that Utah law recognizes the freedom to contract, including to determine what conduct will amount to waiver of rights under the parties' agreement. *Id.* at ¶ 19. Even if the *Mounteer* Court intended to leave the application of contractual law as to express waivers for another day, it is impossible to apply the same reasoning to the Unwritten-Waiver clause here and reach a different conclusion as doing so would render the clause meaningless, unenforceable and ignored, and the "complete and unintended loss of [one party's] contract rights." *Id.* at ¶ 19.

Thus, under the reasoning of *Mounteer*, even express oral waiver of the right to "insist on performance of an underlying provision [limiting a person to one distributorship] is insufficient to establish the intentional relinquishment of [LifeVantage's] rights under the [Unwritten-Waiver clause]." *Mounteer*, 2018 UT 23, ¶ 24. In other words, even assuming LifeVantage orally waived the underlying provision or even the Unwritten-Waiver clause itself, such an action is entirely consistent with the flexibility of rights set out in the agreement—that waiver shall only occur if in writing by an officer of the Company. *Id.* Clearly, "a finding of waiver in such circumstances would thus render the [Unwritten-Waiver clause] meaningless." *Id.*; see also *id.* at ¶ 22 (quoting *Van Bibber v. Norris*, 275 Ind. 555, 419 N.E.2d 115, 121 (1981) ("[a]llowing waiver where the party has not clearly waived the antiwaiver provision would undo [the agreement between the parties] and would 'beg[] the question of validity of the non-waiver clause.'")); *Encon Utah, LLC v. Fluor*

675, 616 P.2d 496, 497 (1980) (prior opinions superseded by more recent opinion); *Acme Realty Co. v. Schinasi*, 215 N.Y. 495, 504, 109 N.E. 577, 579 (1915) (same); *State v. Adams*, 144 Ohio St. 3d 429, 472, 2015-Ohio-3954, ¶ 265, 45 N.E.3d 127, 171 (same). To the extent *Calhoun* could be considered to contradict *Mounteer*, *Mounteer* controls.

Ames Kraemer, LLC, 2009 UT 7, ¶ 15, 210 P.3d 263 (This court “consider[s] each contract provision . . . with a view toward giving effect to all and ignoring none.” (internal quotation marks omitted)).

For all these reasons, Plaintiffs’ breach of contract and declaratory relief claims—which rise and fall on whether LifeVantage waived the Unwritten-Waiver clause—fail as a matter of law.

CONCLUSION

This Court should now reverse the trial court’s denial of LifeVantage’s motion to dismiss and, on remand, direct the trial court to enforce the parties’ agreement as written, and grant LifeVantage’s motion to dismiss.

DATED this 3rd day of February, 2020.

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/s/ Gregory M. Saylin

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11), I certify that this brief complies with the word count limitations of Rule 24(g) because, excluding parts of the document exempted by Rule 24(g)(2), this document contains 3597 words. I further certify that this brief complies with the requirement of Rule 21 governing public and private records.

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PROOF OF SERVICE

The undersigned hereby certifies that on this 3rd day of February, 2020, true and correct copies of the foregoing **BRIEF OF APPELLANT** was sent via e-mail, with two printed and bound copies to follow via U.S. Mail, postage prepaid to the following:

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