

2001

Glade Leon Parduhn v. Natalie Buchi, Allison Buchi, Annabelle Buchi, Lance Buchi, Jessica Buchi, Joanne Buchi : Brief of Appellee

Utah Court of Appeals

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FEB 15 2002

IN THE UTAH SUPREME COURT **PAT BARTHOLOMEW**
CLERK OF THE COURT

GLADE LEON PARDUHN,)	BRIEF OF THE APPELLEES
)	(THE BUCHI CHILDREN)
Plaintiff/Appellant,)	
)	Oral Argument: March 14, 2002
vs.)	
)	Case No. 2001-0926-SC
NATALIE BUCHI, ALLISON BUCHI,)	(Consolidated With: 2001-0811-SC)
ANNABELLE BUCHI, LANCE BUCHI and)	
JESSICA BUCHI (the "Buchi Children") and)	Argument Priority: 15
JOANNE BUCHI,)	
)	Third District Civil No. 97-090-7879-MI
Defendants/Appellees.)	

On Appeal from the Third District Court
Judges: Bruce C. Lubeck & Anne M. Stirba

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IN THE UTAH SUPREME COURT

GLADE LEON PARDUHN,

Plaintiff/Appellant,

vs.

NATALIE BUCHI, ALLISON BUCHI,
ANNABELLE BUCHI, LANCE BUCHI and
JESSICA BUCHI (the "Buchi Children") and
JOANNE BUCHI,

Defendants/Appellees.

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PARTIES

1. Plaintiff/Counterdefendant/Appellant: Glade Leon Parduhn
(Partner of Brad Buchi, deceased)
2. Defendants/Counterclaimants/Appellees: Natalie Buchi, Allison Buchi, Annabelle Buchi, Lance Buchi and Jessica Buchi
(Children of Brad Buchi, deceased)
3. Defendants/Counterclaimants/Appellees: Joanne Buchi
(Widow of Brad Buchi, deceased)

TABLE OF AUTHORITIES

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ISSUES FOR REVIEW

1. Were there disputed material facts and was it legally correct for the trial court to deny Parduhn's August 18, 2000 summary judgment motion?
2. Was there factual evidence to support, and was it legally correct for the court to conclude Buchi and Parduhn intended and agreed that upon Buchi's death the insurance proceeds go to his children and widow, and the partnership assets to Parduhn?
3. Was it legally correct for the court to allow parol evidence to make that determination?
4. Was there factual evidence to support, and was it legally correct for the court to conclude sale of the partnership's gas stations prior to Buchi's death did not make the partnership agreement, with its buy-sell provision, null and void since the partnership continued to exist after the sale, well after Buchi died?
5. Did the trial court decide all material issues or did some remain for a second phase of the trial under the bifurcation agreement?
6. Was there factual evidence to support, and was it legally correct for the court to conclude Parduhn did not have an insurable interest outside of the partnership agreement with its buy-sell provision? Hence, if it is assumed as Parduhn claims, that the partnership agreement was null and void, did the court correctly conclude Parduhn still cannot claim the proceeds because he does not have an insurable interest?
7. Did the court deny Parduhn due process by entering the September 16, 2001 Order and Judgment and did the court deny Parduhn due process by denying his motion for a stay pending this appeal?

STATUTES & RULES

1. Utah Partnership Code:

Utah Code Ann., Section 48-1-27. Partnership *not* terminated by dissolution. . . . On dissolution a partnership is *not* terminated, but *continues* until the winding up of the partnership affairs is completed. (Emphasis added). 8, 11, 14, 16, 19

2. Utah Uniform Probate Code:

Utah Code Ann., Section 75-6-201. Provisions for payment or transfer at death. (1) Any of the following provisions in . . . any . . . written instrument effective as a contract . . . are considered *nontestamentary*, and this code does *not* invalidate the instrument or any provision:

(a) that *money* . . . controlled, or owned by a decedent *shall be paid after his death to a person designated* by the decedent in . . . a *separate writing* . . . ;

. . . .

(c) that any property which is the subject of the instrument *shall pass* to a person *designated* by the decedent in either the instrument or a *separate writing*

. . . .

Editorial Board Comment: The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It *does not invalidate other arrangements by negative implication*. (Emphasis added). 9, 16-18, 20

3. Utah Insurance Code:

Utah Code Ann. Section 31A-22-413(1)(b). [N]o life insurance policy . . . may restrict the right of a policyholder . . . if the designation of beneficiary is not explicitly irrevocable, to *change the beneficiary*. . . . Subsection 75-6-201(1)(c) applies to *designations by . . . separate writing*. (Emphasis added). 17, 18

4. **Rule 56(c), Utah Rules of Civil Procedure.**

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admission 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 judgment as a matter of law. 13

5. **Rule 62, Utah Rules of Civil Procedure.**

Stay upon entry of judgment. Execution or other proceedings to enforce a judgment **may** issue immediately upon the entry of the judgment, unless the court in its discretion and on such condition for the security of the adverse party as are proper, otherwise directs. 21

STATEMENT OF THE CASE

This is a dispute over who should be awarded \$300,000 in life insurance proceeds paid on the death of Brad Buchi.

Plaintiff Glade Parduhn was Brad Buchi's business partner. His *sole* basis for claiming the proceeds is that he is the beneficiary named in the policy. He makes this claim even though the partnership agreement he entered into with Brad Buchi provides if one partner dies the other gets the business and the deceased partner's family gets the insurance proceeds. Parduhn claims the partnership was dissolved upon the sale of its two gas stations. Without citing any authority, he claims the partnership agreement with its buy-sell provision became "null and void" upon sale of the gas stations even though the partnership's affairs were not wound up, it had not settled its debts, it was involved in ongoing litigation and no final accounting or distribution had been made. Parduhn disregards **Section 48-1-27, Utah Code Ann.**, which specifically provides that a partnership continues in existence after dissolution so that its affairs can be wound-up.

The Defendants are Brad Buchi's children and widow. They claim the insurance proceeds for several reasons: (1) The partnership agreement entered into between Plaintiff and Brad Buchi provides that upon the death of a partner his family gets the insurance proceeds and the surviving partner gets the business; (2) The \$300,000 policy was purchased at the insistence of Lisa Buchi, Brad Buchi's wife at the time (they have since divorced) to provide for the Buchi family under the terms of the partnership agreement if something happened to Brad Buchi; (3) The insurance application for the \$300,000 policy states the purpose of the policy was for the partnership and its buy-sell provision; (4) There is no agreement, letter or other writing which provides the partnership's buy-sell provision

should be disregarded; (5) Buy-sell provisions in partnership agreements are commonplace and are allowed as nontestamentary contracts under **Section 75-6-201, Utah Code Ann.**; (6) There is no evidence Brad Buchi and Parduhn intended that if Buchi died, his widow and children would receive no part of the insurance proceeds while Parduhn would receive them all.

After hearing the evidence at trial, Third District Court Judge Bruce Lubeck agreed with Buchi's widow and children. He awarded them the insurance proceeds and awarded Glade Parduhn all the partnership assets. Parduhn appealed.

MATERIAL FACTS

1. Glade Parduhn and Brad Buchi (deceased) entered into a written partnership agreement dated May 23, 1979. **Addendum to Appellant's Brief, Tab 9,p4; R.1620, pp. 20-21.**

2. The Agreement had a "key Man" life insurance provision. **Addendum to Appellant's Brief, Tab 9,p4.**

3. "Key Man" life insurance is defined as follows: "Type of **insurance coverage** purchased by companies to protect them on the death or disability of a valued employee or by partnership to provide for funds with which to buy out the interest of such partner on his death or disability." (Black's Law Dictionary, 5th Ed., p. 781) (Emphasis added).

4. The "Key Man" provision of the partnership agreement provides as follows:

[I]n the event of the death of either of the partners, Brad K. Buchi or Glade Parduhn, . . . *the partnership will end*, and all obligations to the deceased's survivors financially will be released by paying off the deceased persons [sic] survivors. Both partners are insured for **\$20,000** and *all of which will go to the deceased persons wife or survivors*. When the survivors receive their **\$20,000**, *they release the other partner* of any obligation in the business. *The surviving partner will own the business* and may do with the business as he see's [sic] fit. (Emphasis added).

5. As their business grew, Parduhn and Brad Buchi decided to increase their life insurance. On January 25, 1984, they amended the partnership agreement to provide for \$100,000 coverage on each. The *intent* of Mr. Buchi and Mr. Parduhn that the deceased partner's wife and children would be entitled to the entire proceeds of the policy was reinforced when they wrote a small memorandum that states, "In the event of a death of either partner the remaining partner *shall pay* \$100,000 to the survivors of the deceased *with the proceeds of the \$100,000 insurance policy which each own on each other*. **Addendum to Appellant's Brief, Tab 10.**

6. The business of Brad Buchi and Parduhn continued to grow. In 1989, Brad Buchi's wife Lisa Buchi thought the partnership needed more insurance so that if anything happened to her

husband, the Buchi family would be taken care of. **R.1620, p.102.**

7. As a result, the life insurance coverage was increased to \$300,000 on the life of Brad Buchi and \$250,000 on the life of Parduhn. **R.1620, p.102-106.**

8. The intent was that Brad Buchi's wife and five children would receive \$300,000 if he were to pass away, and that Parduhn's wife Nedra would receive \$250,000 if he were to pass away. **R.1620, p.102.**

9. This purpose was reinforced by the language in the insurance policy application wherein Glade Parduhn indicated the “**purpose of the insurance and nature of Owner’s insurable interest**” was to fund the “**Buy sell/partner[ship]**” agreement. **Addendum to Appellant’s Brief, Tab 11, “Application” pg.2, line 31f.**

10. The premium payments were not paid by the partners individually. All the premiums were paid by the partnership, reinforcing the fact that the policies were to fund the buy-sell portion of the partnership agreement. **R.1620, p.47.**

11. A few days prior to August 8, 1997, Brad Buchi died. **R.1620, p.57.**

12. At the time of his death, Mr. Buchi and Mr. Parduhn had already entered into an agreement to sell the assets of their partnership. The sale closed July 14, 1997. **R.1620, p.32.**

13. There was no agreement, letter or other writing which **terminated** the partnership agreement at the time of closing or at any time thereafter. **R.1620, pg49, lines 19-21.**

14. By operation of law, the partnership *continued to exist* after the closing during a winding up process. **Section 48-1-27, Utah Code Ann.**

15. After the death of Brad Buchi it continued to exist to settle its debts and defend ongoing litigation. **R.1620, pgs.38-39.** Even now it continues to exist since no final accounting or distribution had been made. **R.1620, pgs.38-39.**

16. Never did Brad Buchi and Parduhn enter into any agreement, written or otherwise, to disregard or supercede the partnership agreement with its buy-sell provision. **R.1620, pgs. 50-51.**

SUMMARY OF ARGUMENT

1. Parduhn's summary judgment motion was properly denied because there were disputed facts and more than one conclusion of law could have been drawn.

2. The facts presented at trial support the legal conclusion Parduhn and Buchi intended and agreed that Buchi's children and widow were entitled to the insurance money and Parduhn to the partnership assets upon Buchi's death.

3. It was correct for the court to allow parol evidence to determine whether Brad Buchi and Parduhn intended and agreed that Parduhn have the partnership business and Buchi's widow and children have the insurance proceeds upon Brad Buchi's death.

4. The court correctly concluded the sale of the partnership's gas stations prior to Buchi's death did not make the partnership agreement null and void.

5. The trial court decided all material issues; none remain for a second phase of the trial under the bifurcation agreement.

6. The trial court correctly concluded Parduhn did not have an insurable interest other than through the buy-sell agreement.

7. The court did not deny Parduhn due process by entering the September 16, 2001 Order and Judgment or denying his motion for a stay pending this appeal.

ARGUMENT

A trial court's findings should not be disturbed on appeal where an appellant does not demonstrate they are legally insufficient and does not cite to the record of the trial court to demonstrate error. Burns v. Summerhays, 927 P.2d 197, 198 (Utah 1989). An appellant must properly cite to the record, not fail to provide it or obfuscate it. *See, generally*, Commercial Union Associates v. Clayton, 863 P.2d 29 (Utah App. 1993).

I. PARDUHN'S SUMMARY JUDGMENT MOTION WAS PROPERLY DENIED BECAUSE THERE WERE DISPUTED FACTS AND MORE THAN ONE CONCLUSION OF LAW COULD HAVE BEEN DRAWN.

Parduhn's first assignment of error is that the trial court should have granted his October 2001 summary judgment motion. This claim can only succeed if there were no disputed material facts and only one legal conclusion could be drawn from those undisputed facts. **Rule 56(c), Utah Rules of Civil Procedure.**

There was a sworn statement from Brad Buchi's widow that the insurance policy in question was intended for Brad Buchi's family, not for Parduhn. **R.521, paragraphs 12-13.** This alone is enough to thwart Parduhn's summary judgment motion. Webster v. Sill, 675 P.2d 1170 (Utah 1983) Also, the trial court properly determined that it was contested "whether the partnership was dissolved by the sale of the two service stations to Blackett Oil or the death of Brad Buchi" **R.1107.** The court determined that "even it is assumed the partners were in the process of dissolution, there are disputed issues regarding whether the partnership agreement and its buy-sell provision remained in full force and effect. Accordingly, Plaintiff's Motion for Summary Judgment is denied." **R.1108.** The court ruled correctly. In Jackson v. Dabney, this court determined that even if the facts set forth

in the motion for summary judgment were not contested, as they were here, summary judgment is still inappropriate if reasonable minds could differ on the legal conclusions to be drawn from those facts. **645 P.2d 613, 614-15 (Utah 1982)**. Stated another way, summary judgment is properly granted only when no genuine dispute exists as to material facts, *only* one legal inference or conclusion can be drawn from those undisputed material facts, and the moving party is entitled to judgment as a matter of law. **Prichard v. State**, **788 P.2d 1178, 1184 (Ariz. 1990)** (*en banc*).

Parduhn argues that sale of the gas stations amount to a dissolution. It was possible that it could be concluded legally that the sale did not amount to dissolution, which only occurred later, upon Buchi's death. Yet even if the sale amounted to dissolution, the partnership was not terminated but continued to exist. **McCune & McCune v. Mountain Bell**, **758 P.2d 914, 917 (Utah 1988)**. There was no factual or legal basis for the conclusion asserted in Parduhn's motion for summary judgment, that the partnership agreement with its buy-sell provision was "null and void." To the contrary, Utah's Partnership Code provides just the opposite: **Utah Code Ann., Section 48-1-27**. "Partnership *not* terminated by dissolution." "On dissolution a partnership is *not* terminated, but *continues* until the winding up of the partnership affairs is completed." (Emphasis added).

As long as a partnership continues to exist, its activities are certainly governed by its partnership agreement. Parduhn has not cited a single authority for his claim the sale of the stations, which arguably amounted to dissolution, made the partnership agreement "null and void." Since the partnership was by statute not terminated but continued to exist, the partnership agreement also continued to exist and was not null and void, absent some agreement between the partners to the contrary. **McCune & McCune v. Mountain Bell**, **758 P.2d 914, 917 (Utah 1988)**. While the

partnership exists, the partnership agreement with its buy-sell provision thus governed its activities. Not a single fact exists to show an agreement to the contrary by the partners. The trial court was thus correct to deny Parduhn's summary judgment motion because neither undisputed facts nor a single statute or case mandated that it be granted. Simply stated, it could have been at the time of the summary judgment motion, and ultimately was concluded by the trial court, that the partnership agreement was in full force and effect at the time of Brad Buchi's death. **R.1451.**

II. THE FACTS PRESENTED AT TRIAL SUPPORT THE LEGAL CONCLUSION PARDUHN AND BUCHI INTENDED AND AGREED THAT BUCHI'S CHILDREN AND WIDOW WERE ENTITLED TO THE INSURANCE MONEY AND PARDUHN TO THE PARTNERSHIP ASSETS UPON BUCHI'S DEATH.

When challenging a trial court's decision, the appellant must marshal all the evidence supporting the trial court's findings of fact and then show that evidence to be legally insufficient to support its conclusions of law. See, e.g., Breinholt v. Breinholt, 905 P.2d 877 (Utah App. 1995). Parduhn has not only failed to marshal all the evidence supporting the trial court's findings of fact, he has also failed to show that evidence is legally insufficient to support its conclusions of law.

Parduhn does not see the forest because he is only concentrating on a single tree. His single argument, the only tree in the forest he apparently sees, is his name as beneficiary on the insurance policy. He has failed to marshal the other significant evidence which supports the trial court's legal conclusion Parduhn's designation as beneficiary was not controlling, as follows:

1. The partnership agreement entered into between Plaintiff and Brad Buchi provides that upon the death of a partner his family gets the insurance proceeds and the surviving partner gets the business. **Addendum to Appellant's Brief,**

Tab 9,p4; Tab 10 and R.1449.

2. The \$300,000 policy was purchased at the insistence of Lisa Buchi, Brad Buchi's wife at the time (they have since divorced) to provide for the Buchi family under the terms of the partnership agreement's buy-sell provision, if something happened to Brad Buchi. **R.1620, pgs. 101-105 and R.1449-50.**
3. The insurance application for the \$300,000 policy, was consideration for the policy and referenced therein, **Addendum to Appellant's Brief, Tab 11,p1, R.1454**, and states the purpose of the policy was for the partnership and its buy-sell provision. Hence the words "partner" and "buy-sell" found therein. **Addendum to Appellant's Brief, Tab 12, para. 31a and 31f.**
4. There is no agreement, letter or other writing which terminated the partnership agreement prior to Brad Buchi death or provides that its buy-sell provision should be disregarded during a winding-up phase after dissolution. **R.1620, pg49, lines 19-21.**
5. Factually, and as mandated by statute, the partnership continued to exist after the sale of the gas stations. **Section 48-1-27, Utah Code Ann.** During this time, it had not settled its debts, it was involved in ongoing litigation and no final accounting or distribution had been made. **R.1620, pgs.38-39.**
6. Buy-sell provisions in partnership agreements are commonplace and are allowed as nontestamentary contracts. **Section 75-6-201, Utah Code Ann.**

7. As authorized by statute, buy-sell provisions may and often do override or supersede the beneficiary designation in an insurance policy.
8. Clarifying the application of this statute to separate writings that change the beneficiary designated in insurance policies, **Section 31A-22-413(1)(b), Utah Code Ann.**, provides as follows:

[N]o life insurance policy ... may restrict the right of a policyholder . . . if the designation of beneficiary is not explicitly irrevocable, to *change the beneficiary* Subsection 75-6-201(1)(c) applies to *designations by . . . separate writing*. (Emphasis added).
9. No evidence was presented at trial that Brad Buchi and Parduhn intended that if Buchi died, his widow and children would receive no part of the insurance proceeds or that Parduhn would be entitled to it all. **R.1455.**

There is ample factual evidence to support the legal conclusions made by the trial court that Parduhn was properly awarded the partnership business and Buchi's widow and children the insurance proceeds.

The Northern Life Policy was part of a "Key Man" provision in the partnership agreement between Brad Buchi and Parduhn and should be interpreted as such. Under the terms of the partnership agreement, Brad Buchi's children, Natalie Buchi and her siblings, are entitled to the proceeds of the policy and Parduhn is entitled to the partnership assets. If Parduhn, in addition to the partnership assets were entitled to the proceeds of the policy on Brad Buchi's life, Parduhn would receive a double recovery in the form of both the insurance proceeds and Brad Buchi's half of the partnership. There is no factual evidence or basis for a legal conclusion Parduhn should retain his full interest in the partnership and also obtain the insurance proceeds on Brad Buchi's death.

Parduhn has failed to meet his burden on appeal to marshal the evidence which supports the trial court's conclusions and then demonstrate that evidence is insufficient to support the legal conclusions drawn by the trial court.

III. IT WAS CORRECT FOR THE COURT TO ALLOW PAROL EVIDENCE TO DETERMINE WHETHER BUCHI AND PARDUHN INTENDED AND AGREED THAT PARDUHN HAVE THE PARTNERSHIP BUSINESS AND BUCHI'S WIDOW AND CHILDREN HAVE THE INSURANCE PROCEEDS.

On page 48 of the **Brief of the Appellant**, Parduhn mistakenly claims, "It was error for the trial court to look beyond the contract of insurance, to parol evidence . . ." to determine who Buchi and Parduhn intended and agreed should have the insurance proceeds if Buchi died. Parduhn argues the insurance policy was an integrated, unambiguous document and thus it was improper to look beyond its four corners. Yet there is factual and legal support for just such a conclusion. Utah statute specifically allows for just that to happen. *See, Sections 75-6-201 and 31A-22-413(1)(b), Utah Code Ann.* Factually, the policy's cover page states the consideration for the policy is the application for insurance which indicates the purpose for which Parduhn and Brad Buchi obtained the policy was to fund the partnership's buy-sell agreement. Parduhn asserts this evidence beyond the four-corners of the insurance contract should be disregarded. Yet this court has specifically held as follows:

A judge should . . . consider *any credible evidence offered to show the parties' intentions*. While there is Utah case law that espouses a stricter application of the rule and would restrict a determination of whether ambiguity exists to a judge's determination of the meaning of the terms of the writing itself, the *better-reasoned approach is to consider the writing in light of the surrounding circumstances*. [Citations omitted]. Rational interpretation requires at least a

preliminary *consideration of all credible evidence* offered to prove the intention of the parties . . . so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.” [Citations omitted]. If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then *extrinsic evidence is admissible* to clarify the ambiguous terms. (Emphasis added).

Ward v. Intermountain Farmers Assn., 907 P.2d 264, 268 (Utah 1995).

Thus, contrary to Parduhn’s assignment of error, it was entirely proper for the trial court to consider parol evidence to determine the intent and agreement of the parties as to whom the insurance proceeds should be awarded.

IV. THE COURT CORRECTLY CONCLUDED THE SALE OF THE PARTNERSHIP’S GAS STATIONS PRIOR TO BUCHI’ S DEATH DID NOT MAKE THE PARTNERSHIP AGREEMENT NULL AND VOID.

Again, Parduhn fails to properly challenge the trial court’s decision. Parduhn fails to marshal all the factual evidence which supports the trial court’s decision that sale of the partnership’s stations did not make the partnership agreement “null and void” as Parduhn claims. Evidence was presented at trial that after the sale of the stations, the partnership continued to exist during the winding-up phase. It was involved in resolving disputes and debts. **R.1620,pgs. 38-39.** It still had other assets. **R.1620,pgs. 38-39.** It was involved in litigation. **R.1620,pgs. 38-39.** It had yet to make a final accounting or disbursement of its assets. **R.1620,pgs. 38-39.** Parduhn fails to marshal these facts. He fails to take into account that dissolution does not mean termination. Utah’s Partnership Code provides: **Section 48-1-27**, Utah Code Ann. “Partnership *not* terminated by dissolution.” “On dissolution a partnership is *not* terminated, but *continues* until the winding up

of the partnership affairs is completed.” **Id.** (Emphasis added).

Parduhn fails to cite any writing, agreement, statute or other authority for his proposition that dissolution terminates a buy-sell agreement. The plain language of the buy-sell agreement indicates otherwise. Upon the death of a partner, by operation of law, dissolution occurs, **Section 48-1-28(4), Utah Code Ann.**, yet buy-sell agreements are by their very nature enforceable under such circumstances. See, also, **Section 75-6-201, Utah Code Ann.**

Parduhn fails to meet his burden not only to marshal all evidence supporting the courts decision that the partnership agreement was not “null and void” upon sale of the stations, but also fails to show such evidence is legally insufficient to support the conclusion of law that the partnership agreement remained in full force and effect at the time of Brad Buchi’s death.

V. THE TRIAL COURT DECIDED ALL MATERIAL ISSUES; NONE REMAIN FOR A SECOND PHASE OF THE TRIAL UNDER THE BIFURCATION AGREEMENT.

Given the court’s decision that all of the proceeds were properly awarded to Brad Buchi’s children and widow, there was no need for the court to hold a second phase of the trial for any of the three reasons expressed in the bifurcation agreement, **Addendum to Appellant’s Brief, Tab 3, page 3, paras 1-3**, as follows: (1) Parduhn was awarded the entire partnership so there was no need to determine any distribution of partnership assets; (2) Parduhn was not entitled to a setoff against Buchi’s widow and children; and, (3) Natalie Buchi’s claim against Parduhn was proper and thus did not amount to interference with contract. No issues remained for a second trial phase.

VI. THE TRIAL COURT CORRECTLY CONCLUDED PARDUHN DID NOT HAVE AN INSURABLE INTEREST OTHER THAN THROUGH THE BUY-SELL AGREEMENT.

Parduhn claims he had an insurable interest when he claimed the proceeds of the policy on Buchi's life and it was error for the court to determine otherwise. However, as the trial court points out, this issue is moot given its ruling on the facts. **R.1456.** If however this question need be addressed for any purpose, **Section 31A-21-104(1)(b)** provides, "a person may not knowingly *procure . . . the proceeds of an insurance policy unless he has* or expects to have *an insurable interest in the subject of the insurance.*" (Emphasis added). At the time he claimed the proceeds, the partnership having been dissolved either by sale of the stations or later by Buchi's death, Parduhn could only have had an insurable interest through the buy-sell agreement.

If it is assumed, as Parduhn claims, that the partnership agreement was null and void, Parduhn has no insurable interest and so still cannot claim the proceeds.

VII. THE COURT DID NOT DENY PARDUHN DUE PROCESS BY ENTERING THE SEPTEMBER 16, 2001 ORDER AND JUDGMENT OR DENYING HIS MOTION FOR A STAY PENDING THIS APPEAL.

If Parduhn's appeal fails on any other basis, these claims of error are rendered moot. However, if they need be addressed, suffice it to say Parduhn has not cited any authority, statute or procedural rule (and cannot for none exists) which requires delay in entry of a judgment merely because a motion to reconsider has been filed. Similarly, **Rule 62, Utah Rules of Civil Procedure**, provides that upon entry of a judgment, a stay may issue. The language is not mandatory. If failure to grant a stay violated due process, a stay would be mandatory upon meeting the security and other requirements of that rule. However, there is no mandatory language, no right to a stay and thus no

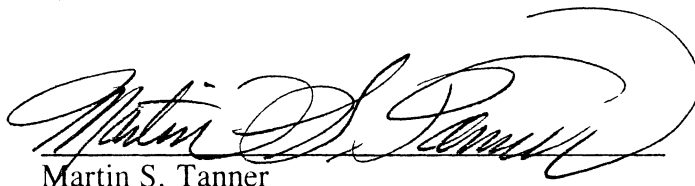
violation of due process if a stay is not granted.

Further, in at least one case, this court has ruled that absent a strong showing of likelihood of success on the merits, the balance should tip in favor of denying a stay. Jensen v. Schwendiman, 744 P.2d 1026, 1027-28 (Utah 1987) Having lost at trial, Parduhn has not and cannot show a strong likelihood of success on the merits and thus a loss of due process rights for any failure by the trial court to grant him a stay.

CONCLUSION & RELIEF SOUGHT

The well reasoned decision of the trial court should stand. Parduhn's appeal should fail. The funds deposited with the clerk of the Third District Court, with any accrued interest, should be released to the Defendants who redeposited them.

DATED this 15th day of February, 2002.


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CERTIFICATE OF HAND-DELIVERY

I certify that I hand-delivered a true and correct copy of the foregoing **BRIEF OF THE APPELLEES**, on the 15th day of February, 2002, to the following:

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