

1991

# Jerrold L. Davis v. Heath Development Company : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

EME COURT

F THE

E OF UTAH

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R

JERROLD L. DAVIS dba JERRY DAVIS AND )  
ASSOCIATES, )

Plaintiff-Respondent, )

vs. )

HEATH DEVELOPMENT COMPANY, a corporation )  
dba PIONEER TRAILER PARK, SANDRA H. )  
FLINDERS, KATHRYN B. HEATH, DOROTHY A. )  
HOUSLEY, BONNIE J. BRINTON, HELEN YOUNG, )  
MARY FRANCIS BENNION, LAWRENCE T. HEATH, )  
CAROLYN H. MARLER, NANCY H. FERRIN, )

Case No. 14549

Defendants-Appellants. )

DOROTHY A. HOUSLEY and BONNIE J. BRINTON, )

Cross-Complainants-Respondents, )

vs. )

HEATH DEVELOPMENT COMPANY, a corporation, )  
dba PIONEER TRAILER PARK, )

Cross-Defendant-Appellant. )

FILED

AUG 10 1976

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Clerk, Supreme Court, Utah

BRIEF OF CROSS-COMPLAINANTS - RESPONDENTS

An Appeal from the Judgment of the District Court of the Third  
Judicial District, The Honorable G. Hal Taylor, Judge

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SUPREME COURT  
OF THE  
STATE OF UTAH

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JERROLD L. DAVIS dba JERRY DAVIS AND ASSOCIATES,	)	
	)	
Plaintiff-Respondent,	)	
vs.	)	
	)	
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IN THE  
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JERROLD L. DAVIS dba JERRY DAVIS AND )  
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dba PIONEER TRAILER PARK, )

Cross-Defendant-Appellant. )

---

CROSS-COMPLAINANTS-RESPONDENTS BRIEF ON APPEAL

---

STATEMENT OF THE KIND OF CASE

This is an action by Plaintiff real estate broker to recover a real estate commission, and an action by Cross-Complainants for specific performance of an Earnest Money Agreement. Each cause of action is against Heath Development Company, a corporation. The individual personal Defendants,

all of whom were stockholders, were dismissed with prejudice pursuant to stipulation at the time of the commencement of the trial.

#### DISPOSITION IN THE LOWER COURT

Trial was held before the Honorable G. Hal Taylor sitting without a jury. Judgment was entered against the corporate Defendant for a real estate commission; and judgment was entered requiring the corporate Defendant, Heath Development Company, to specifically perform the Earnest Money Agreement.

#### RELIEF SOUGHT ON APPEAL

Appellants seek to have the judgment of the District Court reversed, and the Respondents resist the same.

#### STATEMENT OF FACTS

The Defendant Heath Development Company is a Utah corporation (hereinafter referred to as "corporation"). The corporation's only asset at the time of the suit and for many years prior thereto is a piece of real estate on which the corporation (for many years) has operated a trailer park at 937 South State Street, Salt Lake City, Utah. The corporation is a close family corporation having ten stockholders. All officers and directors were stockholders. The Articles of Incorporation set the Board of Directors (hereinafter "Board") at five, and there were four directors and one vacancy at the time of the transaction. There are outstanding ten shares

of common stock of which more than 80% was held by the four members of the Board each of whom owns at least two shares. Of the remaining two shares, five stockholders own approximately two-tenths share each. Over the past ten years the corporation had tried to sell the trailer park, its only asset, and in the absence of such a sale managed the trailer park thereon. During the ten year period, the corporation tried to sell the trailer park on many occasions but never received a written offer thereon with the exception of the Earnest Money Agreement which is the subject matter of this Appeal.

Article X of the Articles of Incorporation provided in the last sentence thereof that "the Board of Directors by resolution shall have power to sell, mortgage or otherwise dispose of the property of this corporation without the consent, ratification or approval of the shareholders." On November 13, 1973, the corporation entered into an exclusive listing agreement with the Plaintiff. That listing agreement was signed by individual stockholders holding in excess of 90% of the common stock, and in addition thereto Director Essie Heath, deceased at the time of trial, signed on behalf of her two children and a sister signed on behalf of a brother so that the listing agreement purports to show 100% of the stockholders signing the same. The members of the family whose names were subscribed to the listing agreement by their mother or sister subsequently denied having given any authority to such family



member.

The Cross-Complainants herein, Dorothy A. Housley and Bonnie J. Brinton, (hereafter "Housley" and "Brinton") were and are owners of over 40% of the common stock of the corporation, and are directors of the corporation. On January 13, 1974, they, together with Elmer E. Brinton (not a party herein), husband of Bonnie J. Brinton, did as purchasers through the Plaintiff make an offer in an Earnest Money Agreement to the corporation to purchase the trailer park for the sum of \$250,000.00. A meeting was held at which all four directors were in attendance and at which the Earnest Money Offer was presented by Mr. Mason Rankin, agent for the Plaintiff. (T. 448) The offer was valid for five days following the presentation, and this was explained and known by the directors. (T. 468) In fact the terms of the offer were gone over at least twice (T. 448-450) and the meeting lasted for approximately two hours. (T. 390) The offer was accepted and signed by all four directors. The informality so generally present in a close family corporation is reflected by the brief minutes of this meeting, Exhibit "4", and reads in total as follows:

"June 13, 1974 Kay's home. Report that property on State Street priced too high - Offer of \$250,000.00 by Dorothy Housley, Bonnie and Elmer Brinton \$500.00 Earnest Money & using their stock position as down payment. We each signed an agreement to sell to Bonnie and Dorothy the property of the Pioneer Trailer Court. May 1st subject to financing." (Underscored portion is in the handwriting of Dorothy Housley)

This minute entry was written by Essie Heath in her handwriting, except the underscored portion, in a small minute book (approximately 4"x7"). The purchase price is clearly set forth; the down payment is designated, and it is specified that the balance is to be paid on or before May 1st. The minutes also reflect a condition precedent, namely, the obtaining of financing which was timely obtained through First Security Bank of Utah by way of a mortgage loan in the sum of \$187,000.00, more than sufficient to pay off the balance after reducing the purchase price by the value of the stock held by Housley and Brinton. The value of the property and the financial statements of Mr. and Mrs. Brinton and Housley were not sufficient to obtain the loan notwithstanding that the loan was a standard commercial loan reflecting 75% of the market value of the property. (T.388) Consequently, the bank required a co-signer who was obtained.

Financing was completed on the 9th day of April, 1974, and Plaintiff's agent, Rankin, immediately contacted Kathryn B. Heath, president and director of the corporation, to obtain her signature on the deed and arrange for a closing date on the following day, April 10th. Pursuant to an appointment made with Mrs. Heath, agent Rankin appeared at her home at which time she categorically refused to sign the deed or any other papers and stated that she would never sign the necessary papers or deed.

The value of the common stock was determined in 1969 or 1970 following the death of Mrs. Housley's mother. This determination was made by the Internal Revenue who set the value at \$18,000.00 per share for federal and state purposes. (T. 471) The Court at the time of trial found the common stock, based on the \$250,000.00 offer, to be approximately \$20,000.00 per share. (Finding of Fact #18)

At pages 5 and 6 of Appellant's Brief, the Appellant sets forth two Earnest Money Agreements, Exhibits D-9 and D-10, as though they were accepted facts and pertain to this case. This is not only misleading but is in error. The Court found both of these offers to purchase from Mr. Hugh Wayman inadmissible on the grounds that they were immaterial. (T. 492 and T. 521) The Court's denial of admissibility is assigned as an error in Point III of Appellant's Brief.

The Court found in favor of the Plaintiff and granted a judgment against the Defendant corporation for \$15,000.00 together with attorney's fees. The Court further ordered specific performance on the Cross-Claim of Housley and Brinton ordering the corporation to convey the property to Housley and Brinton and awarded attorney's fee in the sum of \$7,000.00.

#### ARGUMENT

##### POINT I

THE EARNEST MONEY AGREEMENT OF JANUARY 13, 1973, WAS SIGNED AND ACCEPTED BY THE CORPORATION AND IS ENFORCEABLE.

A close corporation or a family corporation's stock is held by relatively few stockholders, and the Board is usually composed, as the case is here, completely of shareholders. Judicially, a family corporation is allowed to conduct its corporate business with informality, and the courts do not require strict adherence to the corporate law and procedures as is found in the case of regular or public corporations.

There is a monolithic body of law applied to publicly held corporations including complex security regulation systems designed to protect investors. Yet at the same time, courts have recognized a difference between a publicly held corporation and the family close corporation, and an independent body of law has grown up around the close corporation decreasing the regulatory and strict construction of corporation law as applied to close corporation. Utah has recognized the family or close corporation as is evidenced in Peterson vs. Holgren Land and Livestock Co., 12 Ut. 2d 125, 363 P. 2d 786 (1961), where the Court stated:

"Even if the minutes of the Board of Directors were insufficient to show expressed authorization, the facts that it was a family corporation in which the father was the president and actively engaged in furthering its purposes, and the articles of incorporation provided for the acquirement and alienation of real property, the finding of the court that the contract was authorized should be sustained and the ground that there was a binding ostensible authority in its president." (Underscoring added)

Again, in Grover vs. Garn, 23 Ut. 2d 441, 464 P. 2d 598 (1970),

this Court quoting from 19 C.J.S. Corporations §1004, at page 471:

" . . . but the trend of authority is to uphold as binding on the corporation acts or contracts on its behalf by a person or persons owning all or practically all of the stock." (Underscoring added)

With regard to transactions involving interested directors in closed corporations, the Minnesota Court in Fountain vs. Orech's, Incorporated, 245 Minn. 202, 71 N.W. 2d 646 (1955) held that an interested director could be included in determining whether a quorum was present or not, and there are many other cases holding the same. With regard to an interested director voting on a matter, Colorado clearly permits the same in a closed corporation:

"Where, as here, the stock of the corporation is closely held at the time of the transaction, there is no requirement as plaintiffs contend, that an independent board of directors approve such transaction." Swafford vs. Barry, 152 Colo. 493, 382 P. 2d 99' (1963)

The Colorado case, Colorado Management Corporation vs. American Founder Life Insurance Co., 359 P. 2d 665, was decided in 1961, two years before the Fountain case, and deals with a public or regular corporation and not a closed corporation. Likewise the cyclopedic authority relied on by the Appellant is confined to the public corporations and not to closely held corporations. A reading of the cases fails to disclose that any of those cases dealt with or urged the closely held corporation theory as a basis for exception to the general

prevailing public corporation law. In fact in the case of Rocket Mining Corporation vs. Rolland J. Gill, 25 Ut. 2d, 483 P. 2d 897 (1971), the interested directors held no stock whatsoever. The public corporation law is intended to control the activities of such director for he has nothing to lose. The real test in a closely held corporation as is set forth in Swafford vs. Barry is that the transaction must be accompanied by a full and fair disclosure of the material facts and must not be attended with unfairness and fraud. The material facts of this transaction were disclosed. The corporation claimed fraud but the Lower Court did not find evidence of fraud and none is alleged on appeal. The Court did find that the purchasers, at the time of making the offer, did believe that \$250,000.00 was the reasonable and fair market value for the trailer court and were unaware of and had no knowledge of any offer by a third party. (Finding of Fact #15)

The Earnest Money Agreement is valid and enforceable.

#### POINT II

THE TRANSACTIONS OF INTERESTED DIRECTORS ARE NOT NECESSARILY VOID OR VOIDABLE.

The Appellant's Brief acknowledges this rule of law by quoting from Branch vs. Western Factors, Inc., 28 Ut. 2d 361, 502 P. 2d 570 (1972) that a contract made by a corporation with its officers is not void per se ". . . but at most voidable within a reasonable time." The Branch case also states

that "a director occupies a fiduciary relationship to his corporation and his personal dealings with the corporation may be voided unless good faith and fairness are shown. The requirement of good faith is one of long standing with this Court. Sweeney vs. Happy Valley, Inc., 18 Ut. 2d 113, 417 P. 2d. 126 (1968), McIntyre vs. Ajax Mining Co., 28 Ut. 171, 77 P. 613 (1904), Runswick et al vs. Floor et al, 116 Ut. 191, 208 P. 2d 948 (1949). Appellant's Brief does not really attack the "good faith" issue, and Finding of Fact #15 shows good faith on behalf of Housley and Brinton.

As pertains to the "fairness" issue, the duty and burden of proof is upon the director to show fairness only after the corporation has raised the question of fairness in its pleadings so that the issues and points therein may be fairly met. The Defendant did not raise the question of "fairness" below, but only in the sense of Housley and Brinton taking advantage of corporate opportunity. The corporation now seeks to raise for the first time another and different item of fairness, namely, that the \$250,000.00 purchase price is unfair. This Court has many times pointed out the fruitlessness of an attempt to shift theory and position on appeal.

" . . . Having by his own pleadings, evidence, and instructions tried and rested the case upon the theory that the mother's negligence would bar the father, he is bound thereby, as the law of the case. He cannot now on appeal shift his theory and position." Pettingill vs. Perkins, 2 Ut. 2d 266, 272 P. 2d 185 (1954) and cases cited therein.

Assuming for the sake of analysis that the question of "fairness" had been properly raised at trial, the evidence showed the transaction to be fair. In such cases this Court has often looked to the facts in a particular case. Here, for over ten years this corporation wanted to sell the trailer court and distribute the proceeds; the directors were aware of a zoning problem with regard to the property; (T. 436) the terms of the sale were cash permitting the distributing of the money and ending of the corporation, a desired end; (T. 469) by signing the agreement 80% of the stockholders acknowledged the contract was fair and ratified it; a prior tax valuation in 1969 or 1970 set the common stock at the value of \$18,000.00 per share; (T. 471) the \$250,000.00 purchase price, after expenses and payment off of the preferred 2,500 shares of stock, par value of \$10.00 per share, would have resulted in cash distribution of approximately \$20,000.00 per share of common stock; (Finding of Fact #18) the corporation had never had a written offer notwithstanding its long efforts to sell the property; Housley and Brinton would not have shared in the cash; and the loan arranged for in the amount of \$187,000.00 was a standard commercial loan and represented 75% of the value of the property and even then there was a requirement by the bank of a co-signer. It is clear that even though the Defendant corporation failed to raise the purchase price as



being an item of claimed unfairness, an examination of the facts reveal that the purchase price was indeed fair.

The Defendant relies on the Runswick case and quotes therefrom, and then goes on to attack the validity of a quorum of the board. This issue has already been met in Point I.

### POINT III

THE DISTRICT COURT DID NOT ERR IN REFUSING TO ADMIT EXHIBITS D-9 AND D-10.

Testimony relating to Exhibit D-9, an Earnest Money Agreement dated March 15, 1974, by and between the two interested directors as sellers and Hugh Wayman, an outsider, as purchaser, was found inadmissible because it was improper cross-examination. (T. 374) Appellant's Brief fails to attack this Court ruling.

The Defendant then again offered Exhibit D-9 for a particular purpose as stated by its attorney:

"I claim, Your Honor, this is taking  
advantage of a corporation opportunity."  
(T. 492-3)

The Court correctly ruled Exhibit D-9 as being immaterial as there was no evidence of Housley and Brinton taking advantage of any corporate opportunity. That evidence did not exist at the time the exhibit was offered nor did it come about thereafter as is reflected in the Court's Finding of Fact #5 which is not attacked by the Defendant.

Corporate opportunity is defined in 19 Am Jur 2d 720,

Corporations §1311, as follows:

"A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain. The rule as supported by a number of cases is that if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, which is, from its nature, in line of the corporation's business and is a practical advantage to it, and which is one in which the corporation has an interest or reasonable expectancy, and if, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of the corporation, the law will not permit him to seize the opportunity for himself. If he does the corporation may claim the benefit of the transaction. . . . The doctrine charges the interest acquired by an officer or director of a corporation in violation of his duty with a trust for the benefit of the corporation."

Housley and Brinton at the time of making their offer to the corporation believed that the \$250,000.00 offer was a reasonable and fair market value for the trailer court and were unaware of and had no knowledge of any offer by a third party or parties to purchase the trailer park for a sum in excess of the offer which they made. Further, Exhibit D-9 was never offered to show market value or unfairness of the purchase price, but only to pursue the corporation's claim of corporate opportunity. Appellant failed to show the existence of any outstanding corporate opportunity at the time the transaction was entered into with Housley and Brinton.

Exhibit D-10 is an Earnest Money Offer which was never

accepted by the corporation, and dated April 11, 1974, from a third party to the corporation. In pursuing the corporation's theory of Housley and Brinton taking advantage of corporate opportunity, the exhibit was offered to show the market value of the trailer court. Since the offer was never accepted, the Court correctly excluded it.

"The pronounced tendency of most of the courts which have dealt with the matter has been to rule against the admissibility upon the issue of the market value of the real property as evidence as to mere unaccepted offers to purchase." (Annotation 7 ALR 2d 784, §2 entitled Unaccepted Offer for Purchase or Sale of Real Property as Evidence of Value)

The Sweeney case cited by the corporation is not applicable since it deals with an actual sale rather than an offer to purchase. In the St. Joe Paper Company vs. United States, 155 Fed. 2d 93, Flor. (1964) the Court examined the reason behind the general rule of not allowing offers to establish market value and stated:

". . . the amount for which an owner could have sold his property or which a prospective purchaser might have been willing to pay' is influenced by too many fortuitous circumstances to be revelant on the inquiry of value to be admissible as substantive proof thereof by the owner in a condemnation proceeding.'"

Further, Exhibit D-10 is inadmissible under the heresay rule as the offer was tendered in order to show the truth of the matter stated therein, namely, valuation of the property. The offeror was not a party to this lawsuit, nor was he a

witness; nor was it shown that he had an expertise as to valuation of property.

Exhibits D-9 and D-10 were properly excluded. Interestingly enough the remedy, as noted above, available for taking advantage of corporate opportunity results in a trust of the benefits or advantages for the corporation. The Appellant has never sought the remedy, but uses the doctrine of corporate opportunity as a basis for the corporation's refusal to complete the sale of the trailer park.

#### POINT IV

THE PROVISIONS OF SECTION 16-10-74, U.A.C. 1953, AS AMENDED, WAS COMPLIED WITH OR WAS NOT APPLICABLE.

This statute is limited to the sale of all of the property and assets of the corporation, if not made in the "usual and regular course of its business." The sale in this case was made in the usual course of the corporation's business. The facts of this case reveal that for at least ten years the corporation had two purposes or objects. One was to sell the trailer park and to liquidate and distribute the monies resulting therefrom. The second object was to manage the trailer park for such period of time as it may be necessary to obtain the sale and distribution. The corporation for at least ten years had so acted with this dual purpose in mind. (Finding of Fact #4) Thus, the Appellant corporation was not unlike the corporation which is created for the purpose of managing and disposing of

a particular estate or property. In Jeppi vs. Brockman Holding Co., 34 Cal. 2d (Adv. 10), 206 P. 2d 847, 9 ALR 2d 1297 (1949) it involved a corporation which was formed for such purpose and construed a similar statute as not prohibiting the sale even of all its corporate property if in fact such sale achieves its goals and purposes. (See Annotation 9 ALR 2d 1306, Sale of Corporate Assets.)

There is a split of authority as to who may assert the invalidity of a sale based upon a statute of this kind. The various holdings are discussed in Annotation 58 ALR 2d 784, Disposal of Property. It seems clear that this type of statute was enacted for the protection of the shareholders, and the general rule is that shareholders alone have the right to enforce the statute's requirements. At Page 793 of the Annotation it is stated:

"A statute of this type under consideration being for the sole benefit of the shareholders, is ordinarily held that the corporation itself has no standing to allege the invalidity of the transfer of its property executed without the consent required by statute of its stockholders. . ."

Our own statute must be read in light of the following section, namely, 16-10-75, which confers upon the "shareholder" the right to dissent and take appropriate action. This Court in Ubeva Mines vs. Toledo Mining Co., 24 Ut. 2d 351, 471 P. 2d 867 (1970), has held that Section 74 inures to the benefit of the shareholders and must be asserted by them.

Failure of the shareholders to assert this statute within one year impliedly waives their rights. Further, all ten stockholders were parties Defendant to this lawsuit as originally filed and none of them raised the statute or the benefits thereunder as a defense. In fact all of them agreed to be dismissed out of the lawsuit with prejudice, and thereby again waived their rights under the statute. In addition, the shareholders waived their right under the statute by virtue of Article X of the corporation's Articles of Incorporation which state that: "The Board of Directors by resolution have power to sell. . . the property of this corporation without consent, ratification or approval of the stockholders."

The Grover case appears to be controlling in this case. It follows the line of reasoning that where the owners of substantially all of the shares of authorized stock enter into a contract, the contract becomes binding upon the corporation even though the formal requirements of the statute have not been met. The Grover case involved a family corporation with the husband and wife owning 90% of the shares and being directors of the corporation. They entered into a contract on behalf of the corporation for the sale of real property and the primary asset of the corporation. The contract was never formally ratified by the remaining stockholders. This Court held that the failure to obtain the shareholders' formal ratification did not destroy the contract. Further, this

Court recognized that:

" . . . trend of authority is to uphold as binding upon the corporation acts or contracts on its behalf by a person or persons owning all or practically all of the stock." (Utah Citation, Page 446)

The corporation's attempt to distinguish Grover by claiming that the holding was based upon a finding that the corporation in that case was a sham corporation. Such is not the case. This Court actually reversed the Trial Court's ruling of personal liability of the shareholders of the corporate contract, and recognized the validity of the corporation.

Section 16-10-74 of our Code is not a bar to this transaction.

#### POINT V

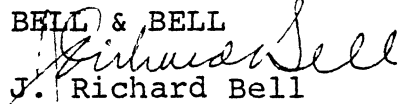
DID THE DISTRICT COURT ERR IN AWARDING INTEREST OF 6% PER ANNUM ON PLAINTIFF'S ATTORNEY'S FEES FROM APRIL 10, 1974, UNTIL ENTRY OF JUDGMENT?

This issue does not affect the position of the Cross-Complainants - Respondents Housley and Brinton and therefore no position is taken.

#### CONCLUSION

It is respectfully requested that this Court uphold the judgment of the Trial Court as pertains to the Respondents Housley and Brinton, and that the Defendant corporation specifically perform the agreement.

Respectfully submitted,

BELL & BELL  
  
J. Richard Bell  
303 East 2100 South  
Salt Lake City, Utah 84115