

1992

Gilbert Chavez and Rachel Chavez, as parents and
guardians of Peter Chavez, an incompetent v.
American Quarter Horse Association : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Chavez v. American Quarter Horse Association*, No. 930711 (Utah Court of Appeals, 1992).
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IN THE UTAH COURT OF APPEALS

GILBERT CHAVEZ AND RACHEL
CHAVEZ, as parents and
guardians of PETER CHAVEZ,
an incompetent,

Plaintiffs,

v.

AMERICAN QUARTER HORSE
ASSOCIATION; WASHINGTON
COUNTY, UTAH; and JOHN
DOES 1-10,

Defendants/Appellant,

v.

INTERNATIONAL ASSOCIATION OF
LIONS CLUBS,

Third-Party Defendant/Appellee.

Case No. 930711-CA

(910500157PI)

Priority No. 15

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO.

930711

REPLY BRIEF OF APPELLANT

**APPEAL FROM FINAL ORDER AND JUDGMENT OF THE FIFTH
DISTRICT COURT, WASHINGTON COUNTY, STATE OF UTAH
THE HONORABLE JUDGE J. PHILIP EVES, PRESIDING**

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FILED
Utah Court of Appeals

SEP 23 1994

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STATEMENT OF ADDITIONAL RELEVANT FACTS

Rule 24 of the Utah Rules of Appellate Procedure does not specifically call for a statement of additional facts in a reply brief. In light of the American Quarter Horse Association's (hereinafter referred to as the "AQHA") position that the only issue on appeal is that of the enforceability of the indemnification agreement, the International Association of Lions Clubs' (hereinafter referred to as the "International") brief arguing the agency question, the AQHA's motion to strike and the court's denial of that motion, however, it is imperative that the court consider the following set of disputed facts on the issue of agency.

1. The International had authority to "supervise" the St. George Lions Club. (The International Association of Lions Clubs Constitution and By-Laws, Article II, Section 1(a), hereinafter referred to as the "Constitution".) R 764.

2. The International had authority to "coordinate the activities and standardize the administration" of the St. George Lions Club. (The Constitution, Article II, Section 1(b).) R 764.

3. The International had authority to govern the St. George Lions Club according to the Constitution. (The Constitution, Article III, Section 4, and Exhibit "12" to Mark Lukas' deposition.) R 765.

4. The St. George Lions Club was under the "exclusive jurisdiction of the International's Board of Directors." (The Constitution, Article III, Section 5.) R 765.

5. The International had the power to cancel the St. George Lions Club charter if it failed to meet any obligation to the International. (The Constitution, Article III, Section 6.) R 765.

6. The International had the power to grant membership in the St. George Lions Club. (The Constitution, Article III, Section 8.) R 765.

7. The International had the power to require members to regularly attend meetings and to participate in club activities. (The Constitution, Article III, Section 9(a).) R 765.

8. The International required the St. George Lions Club to further the "Lions Clubs International objectives and Lions Code of Ethics." (The Constitution, Article XI Section 1(k).) R 777.

9. The International authorized the St. George Lions Club "to carry on activities for the advancement of the civil, cultural, social or moral welfare of the community and for the promotion of international understanding". (The Constitution, Article XI Section 1(d).) R 777.

10. The International's organizational framework is represented by a map containing a legend which depicts a solid line next to the phrase: "Policy and Direct Control." A solid line is then drawn from the box containing the position "President" to "District Governors" on down to a box containing the term "Lions Clubs." The St. George Lions Club was under the "direct control" of the International President. (Exhibit "I" to memorandum in opposition to motion for summary judgment.) R 853.

11. The International purchases liability insurance from the dues it receives from the members of the local clubs. (Deposition of Mark C. Lukas, p. 42, R. 1340 et. seq.)

12. The International sends directors to each club approximately once a month. (Deposition of Ronald McArthur, p. 67, lines 8-25, R. 1526 et. seq.)

13. The International considers local Lions Clubs "as subordinate unit of the Association." (Exhibit 14 to Mark C. Lukas' deposition, R. 1340 et. seq.)

14. A potential member of the St. George Lions Club must be officially recognized by the International before the individual can be considered as a Lion member. (The Standard Form Constitution and By-Laws, hereinafter referred to as "Standard Form Constitution", Article III Section E.) R 813.

15. The secretary of the St. George Lions Club is required to submit a monthly report to the International's office with information requested by the International. (The Standard Form Constitution, Article VII, Section D (4)(a).) R 814.

16. There are no rules limiting the authority granted to the St. George Lions Club to carry out activities which further the objectives of the International. (The Standard Form Constitution, Article VIII, Section E, R 817; Constitution, Article XI Section 1(k).) R 777.

17. The International directed Lions Clubs not to engage in certain activities including: dunk tanks, events where alcohol is served, amusement rides, carnivals, circuses, rodeos, snowmobiles, go-carts, skateboards, rock concerts, fireworks displays, parks, playgrounds, swimming pools, construction

and demolition projects. (A Program of Liability Insurance, p. 6; the International's response to the AQHA's request for production of documents.) R 798.

18. The members of the St. George Lions Club are members of the International. (Deposition of Ronald McArthur, p. 78, lines 19-25, R. 1526 et seq.)

19. The International authorizes the St. George Lions Club to use its code numbers for tax exempt status. (Deposition of Ronald McArthur, p. 80, lines 117-24, R. 1526 et. seq.)

20. The International knew the St. George Lions Club sponsored the Dixie Downs races for each year prior to 1989. (Membership and Activities Reports; the International's response to the AQHA's request for production of documents.) R 789-793.

21. The Dixie Downs horse race is the type of activity which meets the objectives of the International. (Deposition of Ronald McArthur, p. 88, lines 15-21, R. 1526 et. seq.)

22. The International allowed the St. George Lions Club to proceed with the horse racing meets. (Deposition of Ronald McArthur, p. 81, lines 22-24, R. 1526 et. seq.)

ARGUMENTS

I.

THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT TO ALLOW COMPLIANCE WITH RULE 52(a)

The International argues that a trial court does not need to state the ground for its decision with respect to the granting of a motion for summary judgment. The International criticizes the AQHA's citation of *Dover Elevator Co. v. Hill Mangum Investments*, 766 P.2d 424 (Utah App. 1988) for authority that this matter should be remanded to the trial court for compliance with Rule 52(a) of the Utah Rules of Civil Procedure. That position is directly rebutted by the plain language of the rule. The last two sentences of Rule 52(a) state:

The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court **shall**, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

[Emphasis added.] Rule 56 deals with summary judgment.

It is clear from the brief filed by the International that the International is requesting that this court, as it did the lower court, consider two grounds upon which to affirm summary judgment in its favor. (The International claims that the indemnification agreement is unenforceable and that the St. George Lions Club is not an agent of the International.) Accordingly, the lower court in this case did not have discretion over whether to "issue a brief written statement of the ground for its decision." It was required, under Rule 52(a), to provide the

parties with a written decision upon which of the two grounds it granted the International's motion for summary judgment pursuant to Rule 56.

It could be argued that the lower court substantially complied with the provisions of Rule 52(a) in stating its position on the record in open court. The case of *Parks v. Zions First Nat. Bank*, 673 P.2d 590 (Utah 1983) suggests that substantial compliance with Rule 52(a) would alleviate the need to have the matter remanded to the trial court. Substantial compliance, however, would at a minimum require that the parties are clear as to the "mind of the court". *Id.* at 601. As is evident from the briefs filed by the parties in the present action, and from the order granting the International summary judgment, the trial court failed, in its order, to make clear the ground upon which it was granting the International's motion for summary judgment. Accordingly, the order should be, as suggested in *Parks*, vacated or, at a minimum, remanded to the trial court for clarification pursuant to Rule 52(a).

II.

THE INDEMNITY AGREEMENT CLEARLY AND UNEQUIVOCALLY EXPRESSES THE INTENTION OF THE PARTIES

The International's sole argument against the enforceability of the indemnity agreement is that it is "too vague to be valid" because it does not delineate the International's agreement "to be responsible for AQHA's negligence." (Brief of Appellee, p. 16.) The International cites the Federal District Court case of *Wollam v. Kennecott Corp.*, 663 F.Supp. 268 (D. Utah 1987) for the proposition that indemnification agreements must use certain

words in order to be clear and unequivocal. The International maintains that the indemnification agreement must state that "the indemnitor will indemnify the indemnitee for his own negligence." *Id.* Neither a close reading of Judge Greene's opinion in *Wollam* nor an examination of the Utah appellate court cases dealing with indemnification agreements requires the parties to use "magic words" to express their intentions. When interpreting a contract, courts are to "look at the contract as a whole to determine the parties' intent." *Gordon v. CRS Consulting Engineers, Inc.*, 820 P.2d 492, 494 (Utah App. 1991); *Ron Case Roofing and Asphalt v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). Additionally, courts "will accord commonly accepted meanings to the words and phrases of a contract whenever possible." *Gordon*, at 494.

With the benefit of hindsight and the prospect of now having to live up to its agreement, the International argues that the indemnification agreement is vague. That argument fails when an examination of the "purpose of the entire agreement and the surrounding facts and circumstances" is objectively made. *Freund v. Utah Power & Light*, 793 P.2d 362, 370 (Utah 1990).

The application for recognition of grading races, which includes the indemnification agreement in question, is a very brief, plain and straight forward document. The entire contents of the application are found on one single-sided sheet of paper. There are only two paragraphs of conditions set forth in that application. There is no fine print in the document and the parties' desires, intentions and requirements are clearly set forth. The Lions Club wanted the recognition by the AQHA for its races at Dixie Downs. In

exchange for that recognition, the Lions Club agreed to "indemnify, save and hold harmless [the AQHA] from any liability arising from unsafe conditions of track facilities or grandstand" Only one meaning can be ascertained from that clause; the International agreed to indemnify the AQHA for its own negligence.

III.

GENUINE ISSUES OF MATERIAL FACT EXIST WITH REGARD TO WHETHER THE ST. GEORGE LIONS CLUB IS AN AGENT OF THE INTERNATIONAL

In order for the International to succeed with its motion for summary judgment on the contention that an agency relationship does not exist between the St. George Lions Club and the International, the International must establish that no genuine issues of material fact exist and that it is then entitled to judgment as a matter of law. This court stated in *Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827, 831 (Utah App. 1989):

Because disposition of a case on summary judgment denies the benefit of a trial on the merits, any doubt concerning questions of fact, including evidence and reasonable inferences drawn from the evidence, should be resolved in favor of the opposing party.

Accordingly, this court will consider the evidence and the reasonable inferences therefrom in the AQHA's favor. "Judgment should only be granted when it appears 'there is no reasonable probability that the party moved against could prevail.' " *Salt Lake City Corp. v. James Constructors*, 761 P.2d 42, 45 (Utah

App. 1988); (citing *Frisbee v. K & K Const. Co.* , 676 P.2d 387, 389 (Utah 1984)).

On the other hand, the burden placed upon the AQHA in opposing successfully the International's motion for summary judgment is that the AQHA need only show facts controverting the facts marshaled by the International. The AQHA is not required to prove its legal theory. The AQHA has met that burden in this case where it is generally acknowledged that agency is a question of fact. *Zions First Nat. Bank v. Nat. Am. Title Ins.* , 749 P.2d 651, 654 (Utah 1988).

The International cites the case of *Foster v. Steed*, 432 P.2d 60 (Utah 1967) as support for its position that the International must "control the day-to-day operations" of the St. George Lions Club in order for an agency relationship to be found by this court. The actual standard, adopted by the Utah Supreme Court, is not nearly so strict. In *Foster*, the court relied on 83 A.L.R. 2d 1284, Anno.: Gasoline Dealer - - Status.

In general, the determinative question [of agency] has usually been posed as one of 'control', the view being that if the defendant controls, or has the **right of control**, the manner in which the operations are to be carried out, the defendant is liable as a master.

(Emphasis added.) *Id.* at 62. See also *Herbst v. Bothof Dairies, Inc.*, 719 P.2d 1231, 1233 (Idaho App. 1986).

This court needs to look no further than the International's Constitution to find several genuine issues of material fact regarding the International's

"right of control" over the St. George Lions Club. The International reserved to itself the power and authority to:

1. Supervise the St. George Lions Club;
2. Coordinate the activities and standardize the administration of the St. George Lions Club;
3. Cancel the St. George Lions Club charter;
4. Grant individual membership in the St. George Lions Club;
5. Require members to regularly attend meeting;
6. Require members to participate in club activities;
7. Carry on certain activities; and
8. Avoid certain activities.

The other Utah case principally relied upon by the International is *Municipal Building Authority of Iron County v. Lowder*, 711 P.2d 273 (Utah 1985). The International, with that citation, maintains that it must agree to the indemnification agreement in order to be bound thereby. In taking that position, the International ignores a very important point set out in the *Lowder* decision. In that case, there was no suggestion that the Municipal Building Authority was actually authorized to bind Iron County nor was there "any basis for finding that third parties will be misled as to the county's liability" *Id.* at 279. An agency relationship can exist where the principal's right of control is such that "one could be so misled" to believe that the agent is acting with the principal's authorization.

The case of *Zions First Nat. Bank v. Clark Clinic Corp.*, 762 P.2d 1090 (Utah 1988) discussed how a principal may grant its agent authority to act on behalf of the principal.

Under agency law, an agent cannot make its principal responsible for the agent's actions unless the agent is acting pursuant to either actual or apparent authority. Actual authority incorporates the concepts of express and implied authority. Express authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf. Implied authority, on the other hand, embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent. Implied authority is actual authority based upon the premise that whenever the performance of certain business is confided to an agent, such authority carries with it by implication authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized. This authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question.

Id. at 1094-45.

In its Constitution, the International expressly authorized the St. George Lions Club to "carry on activities for the advancement of the civic, cultural, social or moral welfare of the community" The Dixie Downs horse race is the type of activity which meets the objectives of the International. The International knew that the St. George Lions Club sponsored the Dixie Downs races and allowed the St. George Lions Club to proceed with the horse racing meets. The International may not have had actual knowledge of the indemnity agreement set forth in the application signed by the St. George Lions Club; however, the International had the right to exercise its control over that

application. The fact that the International failed to exercise its right of control does not destroy the agency relationship between the St. George Lions Club and the International. There are clearly genuine issues of material fact that may support a finding that third parties would have been led to believe, by the actions of the International, that the St. George Lions Club was authorized to enter into agreements on behalf of the International. At a minimum, the International's authority to the St. George Lions Club is implied from "the words and conduct of the parties and the facts and circumstances attending the transaction in question.

CONCLUSION

Based on the foregoing, the AQHA respectfully requests the Utah Court of Appeals to reverse the trial court's summary judgment decision in favor of the International. There are genuine issues of material fact regarding both the indemnification and the agency questions set forth in this appeal. The indemnification agreement entered into by the Lions Club clearly and unequivocally expresses the intentions of the parties when the agreement and the facts and circumstances are examined as a whole. The International has the right to control the activities, operations and agreements entered into by the St. George Lions Club. Accordingly, the St. George Lions Club had the authority to act as the agent of the International when entering into the indemnification agreement. In the alternative, the AQHA requests that this

court remand this matter to the trial court in order to insure compliance with Rule 52(a) of the Utah Rules of Civil Procedure.

DATED this 23rd day of September, 1994.

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CERTIFICATE OF HAND-DELIVERY

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