

2003

# Mi Vida Enterprises v. Mark A. Steen v. Nancy Ciddio Steen-Adams and Charles A. Steen III : Reply Brief

Utah Court of Appeals

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Cynthia Kennedy.

Thomas Finch.

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IN THE UTAH COURT OF APPEALS

**MI VIDA ENTERPRISES, a Utah  
Corporation,**

**Plaintiff and Appellee,**

**and**

**MARK A. STEEN, individually and as  
personal representative of the Estate of  
M.L. Steen,**

**Defendant and Appellee,**

**vs.**

**NANCY CIDDIO STEEN-ADAMS and  
CHARLES A. STEEN, III;**

**Defendants and Appellants,**

**Appellate No.: 20030022**

**UTAH COURT OF APPEALS  
BRIEF**

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**DOCKET NO. 20030022**

**REPLY BRIEF OF APPELLANTS**

**APPEAL FROM A FINAL ORDER OF THE SEVENTH DISTRICT COURT  
HONORABLE LYLE ANDERSON, PRESIDING.**

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**FILED  
UTAH APPELLATE COURTS  
APR 15 2005**

**ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED**

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## IX. ARGUMENT

### 1. THE TRIAL COURT ERRED IN DETERMINING THAT THE STATUTE OF LIMITATIONS HAD EXPIRED IN ITS ORDER ENTERED SEPTEMBER 16, 2002, AS THE BAD ACTS ALLEGED BY THE APPELLANTS WERE CONTINUING ACTIVITIES THAT CAME TO LIGHT IN 1998

Appellees properly note that the summary judgment order dismissing most of Nancy Steen-Adams' derivative claims, *Addendum Ex. 3, TCR 3042-65*, was in effect re-litigated in the court trial. The principal issue therefore becomes whether or not the trial court properly applied the statute of limitations. Appellees reference parts of the record and findings of the court whereby the court generally states that Nancy Steen-Adams was on inquiry notice such that she should have known more than three years prior to filing her complaint that Mi Vida did not have an interest in any of the real property which ultimately was sold to Boulder County for \$2.7 million in 2001. Mi Vida further claims that "there was never a reasonable claim that Mark A. Steen had purchased property in trust for Mi Vida." *Mi Vida Brief, p. 14.*

Contrary to Mi Vida's assertion, Mark A. Steen represented that he was an agent holding title to real property in his name for some type of business entity where Mi Vida was a joint venturer, partner or general partner in the limited partnership. See *Gold Hill Venture Agreement, Exhibit A to Nancy Steen-Adams' Counterclaim, Cross Claim and Third Party Complaint, Trial Exhibit 462; Harris, January 26, 1983 letter, Exhibit C to Nancy Steen-Adams' Counterclaims, Cross Claims and Third Party Complaint, Trial Exhibit 462; Mi*

*Vida Shareholder Minutes, 1987, pp. 134-6, Exhibit 7 to Summary Judgment Motion TCR 2142-2146; Mi Vida Shareholder Minutes, 1989, pp. 56-60, Exhibit K of Exhibits for Dissident Shareholders, TCR 3479.*

Mark Steen, himself, led the shareholders to believe that Mi Vida had an interest in these properties. At the July 8, 1989 Mi Vida Shareholders meeting, Mark Steen reassured the shareholders that the only property he owned in Boulder County was his condominium in Longmont, Colorado. *Exhibits for Dissident Shareholders, TCR 3479 at Exhibit K, p. 57, ll. 13-15.* He further stated that all the other property in Boulder County in Mark Steen's name was held in his name as agent for the limited partnership. *Id. p. 57, l. 19, p. 58, l. 1.* Mark Steen conceded that the property where the mill site sits on the Oscar Load was acquired by Gold Hill Ventures in his name as part of the joint venture property acquisition. *Id. p. 67, ll. 11-14.* In addition, Mark Steen stated "I was purchasing the properties as agent for the mining partnership." *Id. p. 68, ll. 18-19.*

There is no question that in 1989 Nancy Steen-Adams and other shareholders were led to believe that Mi Vida was in some type of partnership, and that Mark Steen was holding title to partnership property in his own name. Mark Steen was in a fiduciary relationship to the shareholders. The existence of a fiduciary relationship may give rise to a duty to disclose, relieving the injured party of the burden of showing an affirmative deception to postpone the running of the statute of limitations. *Snortland v. State*, 615 N.W.2d 574, 578 (N.D. 2000). The Indiana supreme court has found that the doctrine of

fraudulent concealment “operates to estop a defendant from asserting a statute of limitations defense when that person, by deception or violation of a duty has concealed material from the plaintiff thereby preventing discovery of a wrongdoing.” *Leburn v. D.W. Connor, Jr.*, 702 NE.2d 754, 757 (Ind. 1998). In shareholders derivative actions, the statute of limitations is tolled until disclosure or discovery of director’s wrongful conduct, where the directors violate their fiduciary duty to operate their corporation fairly, honestly and openly. *Lowry v. Lowry*, 590 NE.2d 612, 617-18 (Ind. App. 1992).

Nancy Steen-Adams has asserted derivative claims which were dismissed on the basis of notice she should have received in 1991 or 1994. She denied receiving that notice; however, the court as trier of fact held otherwise. Attorney’s fees were awarded to Mi Vida and Mark Steen as a result of her bringing these claims which were determined to be beyond the statute of limitations. As a result of the fiduciary relationship between Mark Steen as a controlling officer and director, Nancy Steen-Adams had a reasonable basis to bring these claims, and the statute of limitations was tolled until the full extent and nature of these many wrongdoings was shown.

## **2. THE ISSUE OF 54(b) CERTIFICATION IS MOOT**

The court of appeals has ruled that the trial court’s certification under Rule 54(b) has been rendered moot. *See Order of Consolidation dated February 20, 2004.*

## **3. THE TRIAL COURT ERRED IN DETERMINING THAT NANCY STEEN-ADAMS AND CHARLES STEEN III HAD AN IMPROPER PURPOSE AND LACK OF MERIT IN FILING THEIR ACTION FOR DISSOLUTION AND**



**RECEIVERSHIP IN COLORADO AS MI VIDA AND MARK STEEN HAVE  
A SIGNIFICANT RELATIONSHIP WITH BOULDER COUNTY,  
COLORADO**

Nancy Steen-Adams and Charles III initially filed their action in Boulder County because that is where the defendants reside, where Mi Vida has its principal place of business and from where it conducts business, where Mi Vida's subject assets are located, and where property owned by Mark Steen's Colorado companies is located. These facts are noted in Judge Bailin's Order denying the Joint Motion to Dismiss Plaintiffs' Complaint filed by Mark Steen, John Steen, Charles Steen, Sr., Mi Vida, and Mark Steen's Colorado Companies. *Addendum Exhibit 1, pp. 4, 7, 12.*

Prior to filing the action in Colorado, the plaintiffs requested a full accounting at least three times from the defendants as authorized by Colorado (and Utah) law, but the defendants chose to ignore those requests. *Trial Court Exhibit B-1, Exhibit 17.* A buy-out under circumstances where the plaintiffs were blocked from determining the true value of their shares was impossible. Moreover, Colorado corporate law does not include a provision requiring a buy-out, and therefore the plaintiffs pursued their lawful option of pursuing dissolution and receivership.

Nonetheless, the trial court found that the appellants filed their complaint in Colorado and pursued dissolution and receivership for an improper purpose and without merit. In their brief, Mi Vida and Mark Steen assert that the impropriety committed by the hands of Nancy Steen Adams framed as "fraud" was the fact that Nancy signed an amended verified

complaint that mistakenly included the same misrepresentations verified by her former co-plaintiff Charles Jr. That error was harmless and did not establish grounds for the court's conclusion that she and Charles III brought their action for an improper purpose or lacked merit. The facts are clear that the Colorado plaintiffs and defendants had such significant contacts with the state of Colorado that it was proper and justified to bring their action in Colorado and therefore the ruling from the Utah trial court finding that appellants abused process by filing their complaint in Colorado and seeking dissolution and receivership is therefore clearly erroneous.

**4. THE TRIAL COURT ERRED IN DETERMINING THAT NANCY STEEN-ADAMS AND CHARLES STEEN III HAD NO REASONABLE CAUSE TO ASSERT THEIR DERIVATIVE CLAIMS AGAINST MI VIDA IN COLORADO**

This issue is argued in issues 5 and 6 below.

**5. THE TRIAL COURT ERRED IN DETERMINING THAT UTAH LAW APPLIED TO CLAIMS BROUGHT BY APPELLANTS IN COLORADO RATHER THAN COLORADO LAW**

In determining whether Nancy Steen Adams and Charles Steen III abused the civil process by bringing their claims in Colorado, the trial court applied Utah law in its analysis.

Assessing fees for the attempt to dissolve Mi Vida in Colorado and for the appointment of a receiver against this Utah corporation, do not technically fall under the derivative statute, and must be based on an abuse of process, [U.R.C.P.] Rule 11 or [U.C.A.] § 78-27-56 basis. And I find there was an improper purpose and a lack of merit to the pursuit of the Colorado litigation in Colorado.

*Addendum Exhibit 4, p. 30; TCR p. 3718 (emphasis added).*

The Restatement (Second) of Conflict of Laws addresses what state's law should be applied in determining whether there was an abuse of process.

The rights and liabilities of the parties for malicious prosecution or abuse of process are determined by the local law of the state where the proceeding complained of occurred, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 155 (1971) (Malicious Prosecution and Abuse of Process) (the "Restatement").

Mi Vida and Mark Steen claim that the dissolution and receivership proceedings brought in Colorado were for an improper purpose and without merit. The court applied Utah law in finding that Nancy and Charles III abused the process by bringing those claims for an improper purpose and without merit. Those claims were brought in Colorado because all defendants reside in Colorado, and the alleged torts took place in Colorado, and Mi Vida's principal place of business is in Colorado, the subject assets are located in Colorado, and the Colorado companies owned by Mark Steen owned significant real property in Colorado. The law the trial court should have applied, therefore, was Colorado law.

To prove a claim of abuse of process, Colorado law not only requires an ulterior purpose for the use of the judicial proceedings and willful action in the use of that process which is not proper in the regular course of the proceedings, but also requires "accomplishing a coercive goal that is not the intended legal purpose of the process."

*American Guarantee and Liability Ins. Co. v. King*, 97 P.3d 161, 170 (Colo. App. 2004)

(emphasis added) (citing *James H. Moore & Assoc. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367 (Colo. App. 1994)). Here, no “goal” was achieved by avoiding Utah buy-out rights by instituting dissolution and receivership. Simply stated, the action had the legitimate purpose of having one lawsuit in one jurisdiction.

6. **THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT MARK STEEN BREACHED THE FIDUCIARY DUTIES OWED TO MI VIDA AND NANCY STEEN-ADAMS, DISMISSED THE DERIVATIVE CLAIMS AND AWARDED ATTORNEYS FEES AND COSTS IN EXCESS OF \$250,000 AGAINST NANCY STEEN-ADAMS.**

Appellants argue that there were numerous breaches of fiduciary duties which the trial court should have recognized and that no attorney’s fees should have been awarded against Nancy Steen-Adams relating to her claims for breach of fiduciary duty. Appellees refute Ms. Steen-Adams’ arguments stating that the trial court record supports the award of attorney’s fees and that any wrongdoing of Mark Steen was effectively inconsequential as the valuation of Ms. Steen-Adams’ shares adjusted for any of these alleged wrongdoings.

Appellants asserted that Mark Steen breached his fiduciary duties by failing to provide a proper accounting. Mi Vida and Mark Steen claimed that the accounting cause of action was dropped. The trial court agreed with appellees and failed to find any wrongdoing on behalf of Mi Vida or Mark Steen for a lack of accounting. A review of Nancy Steen-Adams’ counterclaim, cross claim and third party complaint, *Trial Exhibit 462*, plainly shows that the accounting claim was made against Mi Vida and remained throughout the case. Exhibit 462, at p. 16-17 puts forth the accounting claim. The claim is clearly

stated in Nancy Steen-Adams' third claim for relief at page 16, *Trial Court Exhibit 462, pp.*

16-17. This claim is specifically stated at paragraph 52 on page 17 wherein it states:

The minority shareholders request that Mark, John and Charles, Sr. be compelled to account for their conduct in the management of Mi Vida and that they pay over to Mi Vida all benefits, profits and property of Mi Vida wrongfully appropriated by them; and (b) that Mark Steen companies be compelled to account for any assets or opportunities of Mi Vida which they received, and disgorged such assets or opportunities and any profits derived therefrom to Mi Vida.

The prayer for relief requests an award to the minority shareholders "together with declaratory judgment and accounting, as requested above." *Id.*

There can be no question that Nancy Steen-Adams requested an accounting. It is unchallenged that Mi Vida was consistently late with its tax returns and Ms. Steen-Adams was never provided with any tax return for the year ending June 30, 1999 or year ending June 30, 2000, much less the most current returns. *See Summary Trial Exhibit 616, Addendum, Exhibit 7.* Additionally, the general ledger records for at least the last nine months were never provided or produced to Nancy Steen-Adams.

The record is clear that Mark Steen and Mi Vida never made any distributions to Nancy Steen-Adams and that she was excluded from any advances or other benefits which the rest of the family shared. This is clearly a breach of fiduciary duty. More importantly,

Mark Steen's acquisition of the Continental Bank and Trust note was an acquisition of a Mi Vida asset at a much discounted price. This wrongdoing was once again a breach of fiduciary duty. Appellees' argument that it occurred after the valuation date is simply incorrect. The agreement was made on the date of valuation although not effected until some time thereafter. It is a clear cut breach of fiduciary duty.

Mark Steen, in his appellee brief, repeatedly argues that Nancy Steen-Adams abused the civil process by filing the initial complaint in Colorado thus depriving Mi Vida and the other shareholders of their right to buy out the dissenting shareholders. Neither appellee presents any document showing that Nancy Steen-Adams purposefully used the Colorado forum for the purpose of depriving Mi Vida and Mr. Steen of said rights; rather, appellees infer and attempt to create this malice by repeatedly restating the claim. Mark Steen and Mi Vida failed to acknowledge the true jurisdictional dilemma original counsel, Jeff Reiman, faced in drafting the first complaint. That complaint, *Trial Court Exhibit B1*, included claims against Mark Steen, John Steen and Charles Steen – three Colorado residents, and four Colorado corporations, Southern Cross Prospecting Company, Inc., Gold Leaf Mining Company, Inc., Gold Hill Mines, Inc. and Golden Tontine, LLC. The 29 page verified complaint had 18 exhibits attached to it. A review of that initial complaint shows the considerable, studied research by Mr. Reiman in drafting the complaint when faced with multiple parties in multiple jurisdictions.

The original attorneys representing Nancy Steen-Adams had a difficult task in

attempting to determine what had transpired with Mi Vida and the properties Mark Steen, John Steen and others had acquired. Similarly, the second set of attorneys – principally John Sanders, also had a difficult task when he filed the counterclaim, cross claim and third party complaint on January 31, 2001, *Plaintiff's Trial Exhibit 462*. That 17 page complaint also had four exhibits referencing various suspect real estate transactions by the Colorado corporations. Only when the parties stipulated that the four corporate entities would be part of the Utah litigation was it feasible to bring all the claims in Utah. *See Trial Court Exhibit B-13*.

These types of strategy decisions should not be twisted into a tort or an award of fees against Ms. Steen-Adams.

## **XI. CONCLUSION**

Appellants, in their brief and this reply, have shown this court that they were confronted with a difficult procedural issue in determining where the initial complaint should be filed. Boulder County District Court Judge Bailin found sufficient evidence to allow the complaint to stand in Boulder County. When Mi Vida and Mark Steen filed their action in Utah, they agreed to jurisdiction over the Mark Steen companies. This solved the subject matter jurisdiction problem which could not have been remedied without a Colorado filing. Nancy Steen-Adams has made a sufficient showing that she did not have the requisite malice necessary for award of attorneys fees against her. The court should remand this case to the trial court for a re-determination of the appropriate attorneys fees under the

appropriate law.

Dated this 15<sup>th</sup> day of April, 2005.

HULT LAW FIRM, PC

  
James M. Hult, #9027

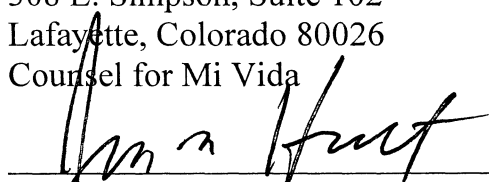
**CERTIFICATE OF MAILING**

I hereby certify that on this 15<sup>th</sup> day of April, 2005, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS** was placed in the United States mail, postage prepaid, properly addressed to:

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