

1992

Leontine C. Pond and Merle G. Hyer Company, a Utah Corporation, holders of Preferred Stock in Insurance Investment Company, a Utah Corporation, on behalf of themselves and other simliarly situated holders of such stock v. Equitable Life and Casualty Insurance Company, a Utah Corporation, Insurance Investment Company, a Utah Corporation, R. Earl Ross, E Roderick Ross, Galen J. Ross, David E. Ross IIC, Diane Ross Worthen, betsy Ross Rapps, Connie Ross, and Does 1 through 20: Brief of Appellee

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Jay B. Bell; P. Bruce Badger; Attorneys for Appellees.

Lynn P. Heward; Delwin T. Pond; Attorneys for Appellants.

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IN THE UTAH COURT OF APPEALS

LEONTINE C. POND and MERLE G. HYER)
COMPANY, a Utah corporation,)
holders of Preferred Stock in)
Insurance Investment Company, a)
Utah corporation, on behalf of)
themselves and other similarly)
situated holders of such stock,)
Plaintiffs and Appellants,)

v.)

EQUITABLE LIFE AND CASUALTY)
INSURANCE COMPANY, a Utah corpora-)
tion; INSURANCE INVESTMENT COMPANY,)
a Utah corporation; R. EARL ROSS;)
E. RODERICK ROSS; GALEN J. ROSS;)
DAVID E. ROSS II; DIANE ROSS)
WORTHEN; BETSY ROSS RAPPS; CONNIE)
ROSS; and DOES 1 through 20,)
Defendants and Appellees,)

Appeal No. 920759-CA

Argument Priority 15

APPELLEES' BRIEF

FILED

Appeal from the Third District Court, Salt Lake County
Civil No. 890905755CV

The Honorable James S. Sawaya

FEB 24 1993

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IN THE UTAH COURT OF APPEALS

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a Utah corporation; R. EARL ROSS;)	
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March 30, 1993

FILED

MAR 31 1993

COURT OF APPEALS

Ms. Mary T. Noonan, Clerk
Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102


Re: Leontine C. Pond, et al. vs.
Equitable Life & Casualty Insurance
Co., et al.
Appeal No. 920759-CA

Dear Ms. Noonan:

I represent the appellees in the above-entitled appeal. On their behalf, I am submitting this letter to you, with seven copies, pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure (Citation of Supplemental Authorities).

The recent written opinion of the Utah Court of Appeals in Equitable Life & Casualty Insurance Company vs. David E. Ross, II, Appeal No. 910746-CA, filed March 10, 1993 (attached), is pertinent to the argument made at pp. 29-33 of Appellee's Brief filed on February 24, 1993.

Sincerely,



P. Bruce Badger

PBB:csW

cc: Lynn P. Heward, Esq.
Delwin T. Pond, Esq.

This opinion is subject to revision before
publication in the Pacific Reporter.

MAR 10 1993

IN THE UTAH COURT OF APPEALS

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Mary T. Noonan
Clerk of the Court

Equitable Life & Casualty)	OPINION
Insurance Co., a Utah)	(For Publication)
corporation,)	
)	
Plaintiff and Appellee,)	Case No. 910746-CA
)	
v.)	
)	F I L E D
David E. Ross II,)	(March 10, 1993)
)	
Defendant and Appellant.)	

Third District, Salt Lake County
The Honorable Richard H. Moffat

Attorneys: Mark A. Larsen, Salt Lake City, for Appellant
Warren Patten, P. Bruce Badger, and Bruce D.
Reemsnyder, Salt Lake City, for Appellee

Before Judges Bench, Garff, and Russon.

RUSSON, Associate Presiding Judge:

David E. Ross II appeals the trial court's orders awarding summary judgment and attorney fees to Equitable Life & Casualty Insurance Co. (Equitable). We affirm.

FACTS

On appeal from an order granting summary judgment, we review the facts in the light most favorable to the non-moving party. Allen v. Prudential Property and Casualty Ins. Co., 839 P.2d 798, 799 (Utah 1992).

In 1986, Bennett Leasing Company (Bennett) attempted a hostile takeover of Equitable by attempting to purchase the stock of David E. Ross II, his wife Connie Ross, his sister Betsy Ross Rapps, and his uncle Galen Ross (collectively, the selling group). R. Earl Ross, Equitable's chief executive officer, and E. Roderick Ross, Equitable's president, opposed the attempted purchase by Bennett. The dispute was resolved when the selling

group agreed to sell their stock to Equitable in exchange for cash and Equitable preferred stock convertible to cash.

After considerable negotiation over several months, Equitable sent an offer to the selling group by letter dated September 25, 1987. That offer provided for an increase in the purchase price of the stock and added:

This increase in purchase price is being made hand in hand with the acceptance of the agreement as enclosed. Any changes made with the agreement will result in the decrease of the proposed purchase price. In other words, a premium is being paid to eliminate argument over the minute terms of the agreement.

The selling group did not accept the agreement as enclosed, but instead prepared, signed, and sent its own offer to Equitable on October 30, 1987. Equitable signed the agreement on November 4, and sent it back to the selling group, with a letter clarifying a few points, which letter was approved by the selling group. The final contract documents consisted of the agreement, an addendum, an escrow agreement, and the letter of clarification.

However, at closing on December 2, 1987, David E. Ross II asserted that an agreement for him to perform consulting services for Equitable, which had been included in earlier drafts of the agreement, should have been included in the final contract documents, but was not. Equitable responded that no such agreement was to be included, to which Ross replied that without same there would be no contract. An impasse was avoided when the parties agreed to "close around the issue" of the consulting agreement, and both Ross and Equitable added handwritten statements to the agreement. Ross wrote:

[B]y signing this instrument I do not waive any right or claim to pursue the Consulting Agreement pursuant to the agreement between the parties. Not given for any acceptance of any funds. In addition, acceptance of any funds pursuant to the agreement shall not be construed as a waiver of any kind.

Equitable added:

By following this directive, Equitable Life and Casualty Insurance Company does not admit or imply that there exists any "Consulting Agreement" or understanding regarding any consulting agreement. In addition, Equitable

Life and Casualty Insurance Company takes the position that receipt of funds and participation herein by David E. Ross is a waiver of rights, if any exist, by David E. Ross. Acceptance of the cash down payment by Daniel Jackson, esquire trustee account, is not a waiver of rights by David E. Ross.

The stock certificates were subsequently delivered to Equitable.

However, when the time came for David E. Ross II to endorse the stock certificates, he refused to do so, claiming a right to rescind the agreement. In response, Equitable filed a complaint for specific performance of the agreement. Ross counterclaimed for rescission of the agreement, alleging mutual and unilateral mistake and seeking damages for breach of contract and fraud. Equitable filed a motion for partial summary judgment enforcing the agreement and thereby dismissing Ross's counterclaim for rescission, which motion was granted.

The matter then proceeded to trial to the bench on David E. Ross II's remaining claim of damages against Equitable for breach of contract. Following Ross's opening statement, Equitable moved for dismissal of the case. The Court, treating the motion as a motion for summary judgment, considered the depositions and exhibits marked by the parties for trial, and granted Equitable's motion. Equitable subsequently requested and received attorney fees and costs.

David E. Ross II appeals, raising the following issues: (1) Were there sufficient material facts to establish his right to rescission under a theory of unilateral mistake, and if so, did he relinquish that right?; (2) Were there sufficient material facts to establish a breach of contract action, entitling him to either rescission or damages?; and (3) Were attorney fees properly awarded to Equitable under the contract and, if so, were such fees reasonable?

STANDARD OF REVIEW

Summary judgment is only proper "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Baldwin v. Burton, No. 900339, slip op. at 4 (Utah February 19, 1993) (footnote omitted); see Utah R. Civ. P. 56(c). "On an appeal from a summary judgment, we construe the evidentiary material submitted on the motion and all reasonable inferences to be drawn therefrom in a light most favorable to the party opposing the motion." Thurston v. Box Elder County, 835 P.2d 165, 166 (Utah 1992) (citations omitted).

"We review the district court's legal conclusions for correctness." Id. (citation omitted).

UNILATERAL MISTAKE

David E. Ross II argues that the trial court erred in granting Equitable's pre-trial motion for summary judgment because there were sufficient material facts to establish his right to rescission under a theory of unilateral mistake. Equitable responds that the trial court properly granted summary judgment because Ross cannot establish his right to rescission on the basis of unilateral mistake under any set of facts. We agree.

In Klas v. Van Wagoner, 829 P.2d 135 (Utah App. 1992), we outlined the four criteria that must be satisfied before rescission based on unilateral mistake will be granted:

1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.
2. The matter as to which the mistake was made must relate to a material feature of the contract.
3. Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.
4. It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in status quo.

Id. at 138-39 (quoting Grahn v. Gregory, 800 P.2d 320, 327 (Utah App. 1990), cert. denied, 843 P.2d 516 (Utah 1991)).

As to the first criterion, there are two kinds of unconscionability: procedural and substantive. Id. at 139. Procedural unconscionability centers on the "relative positions of the parties and the circumstances surrounding the execution of the contract," Jones v. Johnson, 761 P.2d 37, 39 (Utah App. 1988) (quoting Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461 (Utah 1983)), and occurs "where there is an absence of meaningful choice and where lack of education or sophistication results in no opportunity to understand the terms of the agreement." Id. (citing Resource Management Co. v. Weston Ranch and Livestock

Co., 706 P.2d 1028, 1042 (Utah 1985)). "Substantive unconscionability occurs when contract terms are 'so lopsided as to unfairly oppress or surprise an innocent party,' or where there is 'an overall imbalance in rights and responsibilities imposed by the contract, excessive price or a significant cost-price disparity, or terms which are inconsistent with accepted mores of commercial practice.'" Klas, 829 P.2d at 139 (quoting Jones, 761 P.2d at 40).

Applying the foregoing to the facts of this case, we are not convinced that the alleged mistake was so grave as to make enforcement of the contract unconscionable. First, as to procedural unconscionability, there is no indication in the facts that the relative positions of the parties resulted in unequal bargaining positions. To the contrary, the facts show that the parties continually negotiated from equal positions. Nor do the facts indicate that there was an absence of meaningful choice on David E. Ross II's behalf, or that he suffered any lack of education or sophistication that resulted in an inability to understand the terms of the agreement. Instead, the facts show that the parties engaged in many highly sophisticated negotiations, in which numerous substantive changes were made to the agreement. Thus, there was no procedural unconscionability.

Nor was there substantive unconscionability. Utah appellate courts have consistently held that:

sellers and buyers should be able to contract on their own terms without the indulgence of paternalism by the courts in the alleviation of one side or another from the effects of a poor bargain. They should be permitted to enter into contracts that may actually be unreasonable or which may lead to hardship on one side.

Park Valley Corp. v. Bagley, 635 P.2d 65, 67 (Utah 1981) (citation omitted); accord Klas, 829 P.2d at 139-40. This is especially true when the parties are dealing at arms length. Park Valley Corp., 635 P.2d at 67.

In the case at bar, extensive negotiations took place in which numerous items were added to and deleted from the agreement. Given the parties' equal bargaining positions, it is clear that the contract terms were not so lopsided as to unfairly oppress or surprise Ross, nor was there an overall imbalance in rights and responsibilities imposed by the contract. We therefore conclude that enforcement of the contract in this case is not unconscionable.

Additionally, as to the third criterion, David E. Ross II has not shown that the mistake occurred notwithstanding the exercise of ordinary diligence by him. On October 30, 1987, the selling group, of which Ross was a member, prepared, signed, and sent a contract to Equitable. Equitable then signed the contract and sent it back to the selling group, along with a letter clarifying a few points. It was up to Ross at that point to exercise ordinary diligence in examining the agreement prior to the selling group's acceptance. However, he did not raise the issue of the consulting agreement at that time, but waited until closing on December 2, 1987, at which time he agreed to "close around the issue" of the consulting agreement. Thus, even viewing the evidence in the light most favorable to Ross, if there was any mistake on the part of Ross, it was entirely due to his own negligence in not discovering and correcting what he regarded to be an error in the parties' agreement. Under such circumstances, we cannot say that "the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake." Klas, 829 P.2d at 138-39 (quoting Grahn, 800 P.2d at 327); see generally John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205, 1210 (Utah 1987) (party seeking rescission on the basis of unilateral mistake must establish that error occurred despite that party's exercise of due care); Davis v. Mulholland, 25 Utah 2d 56, 475 P.2d 834, 835 (1970) (party is not entitled to rescission if mistake occurred as a result of that party's own negligence).

Accordingly, because David E. Ross II did not fulfill two of the four criteria necessary to justify rescission on the basis of unilateral mistake, the trial court did not err in granting Equitable's pre-trial motion for summary judgment on that claim.

BREACH OF CONTRACT

David E. Ross II appeals the trial court's order granting Equitable's second motion for summary judgment, alleging that the agreement between the parties was ambiguous and that sufficient material facts existed to establish a breach of contract action, entitling him to either rescission or damages. Equitable responds that the contract was unambiguous and did not provide for a consulting agreement for Ross. Thus, Equitable argues, the trial court properly granted its motion.

"Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness." Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988). Furthermore, whether a contract is ambiguous is itself a question of law. Village Inn

Apartments v. State Farm Fire & Casualty Co., 790 P.2d 581, 582 (Utah App. 1990) (citing Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983); Property Assistance Corp. v. Roberts, 768 P.2d 976, 977 (Utah App. 1989)). "Contract language may be ambiguous if it is unclear, omits terms, or if the terms used to express the intention of the parties may be understood to have two or more plausible meanings." Id. at 583 (citations omitted). However, a contract term is not ambiguous simply because one party ascribes a different meaning to it to suit his or her own interests. Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1319 (Utah App. 1991) (citation omitted), cert. denied, 827 P.2d 476 (Utah 1992). Moreover, if we determine that the contract terms are clear and unambiguous, "we interpret them according to their plain and ordinary meaning and extrinsic or parol evidence is generally not admissible to explain the intent of the parties." Id. (citing Faulkner, 665 P.2d at 1293; Valley Bank & Trust Co. v. U.S. Life Title Ins. Co., 776 P.2d 933, 936 (Utah App. 1989)).

As an initial matter, we address David E. Ross II's argument that the selling group accepted Equitable's September 25, 1987 offer, and that since that offer contained a provision that a consulting fee of \$200,000 to be paid to David E. Ross II for being Equitable's legal advisor for five years, such provision should be read into the agreement between the parties. Even viewing the evidence in the light most favorable to Ross, such an argument is untenable.

Although Equitable's September 25 offer did provide for a consulting fee to be paid to Ross, that offer also provided that the agreement must either be accepted as a whole or rejected:

This increase in purchase price is being made hand in hand with the acceptance of the agreement as enclosed. Any changes made with the agreement will result in the decrease of the proposed purchase price. In other words, a premium is being paid to eliminate argument over the minute terms of the agreement.

When an offer specifies the manner in which it must be accepted, it can only be accepted in the specified manner. Otherwise mutual assent is lacking, and no contract is formed. Crane v. Timberbrook Village, Ltd., 774 P.2d 3, 4 (Utah App. 1989); see generally Burton v. Coombs, 557 P.2d 148, 148-49 (Utah 1976). Thus, the selling group's October 30, 1987 offer, which

changed numerous provisions of Equitable's September 25 offer,¹ must be viewed as a rejection of and counter-offer to Equitable's September 25 offer. Accordingly, the selling group's October 30 offer and the addendum, escrow agreement, and Equitable's November 4, 1987 letter of clarification constitute the agreement in question in this case, and we examine those documents for ambiguity.

In doing so, we conclude that the agreement between the parties is clear and unambiguous. Although some of the extrinsic evidence presented to the trial court indicates that earlier drafts of the contract included a provision for a consulting agreement for David E. Ross II, resort to that extrinsic evidence is not required in this case, since such provision is simply not included in the final draft. The final contract, which was drafted by the selling group, makes no reference to a consulting agreement, and this was the offer which was accepted by Equitable on November 4, 1987, and eventually became the agreement between the parties. Given the fact that the selling group, of which David E. Ross II was a member, drafted this offer, which did not include a consulting agreement, it would be grossly inequitable at this point for this court to now go back and insert a consulting agreement into the parties' agreement. Accordingly, we decline to do so.

Furthermore, the only reference to a consulting agreement whatsoever is contained in the addendum to the agreement, and this reference plainly fails to establish the existence of such an agreement. That provision simply provides, in pertinent part:

2. Offset. The redemption, or purchase price of the Equitable Preferred Stock owned or attributed to the Selling Group and redeemed or purchased by Equitable shall be offset and decreased by the amount of federal taxes, interest and penalties, incurred and paid by Equitable as a result of an audit or audits in which Equitable's income tax obligation is increased from adjustments made as a result of the deduction as an ordinary and reasonable expense of any of the

1. These changes included an increase in the down payment to the selling group, a decrease in the preferred Equitable stock, the addition of a payment of \$100,000 to David E. Ross II at closing, an adjustment in the price at which the selling group could redeem their preferred Equitable shares, and an increase in the deferred payment to the selling group, as well as several other changes.

following being partially or totally disallowed;

- (a) Consulting payments to David;
- (b) Payment of \$300,000 to Bennett Leasing Company;
- (c) Settlement of lawsuits with David E. Ross II;
- (d) Payment of \$250,000 to First National Bank of New Jersey.

This provision does not establish the existence of a consulting agreement, nor of any of the other provisions listed, but only indicates that if payments are made, the total payment should be offset by the payment of taxes, interest and penalties incurred and paid by Equitable if those fees are paid, deducted for tax purposes, and then disallowed as tax deductions.²

Nor does the fact that David E. Ross II added the following handwritten language to the addendum to the contract alter our analysis:

[B]y signing this instrument I do not waive any right or claim to pursue the Consulting Agreement pursuant to the agreement between the parties. Not given for any acceptance of any funds. In addition, acceptance of any funds pursuant to the agreement shall not be construed as a waiver of any kind.

2. Moreover, even were we to find the addendum establishes the existence of a consulting agreement, Ross's claim nevertheless fails. The only mention of a consulting agreement in any of the documents which constitute the parties' agreement is this passing reference in the addendum. There is no specification in any of the documents of the scope, the terms, or the value of the consulting agreement. Thus, even if inclusion of such agreement was at one time considered by the parties, clearly there was no "meeting of the minds" as to that issue, as the trial court correctly found to be the case here. Since there was no "meeting of the minds" as to the consulting agreement, it cannot be considered part of the parties' agreement. See Cottonwood Mall Co. v. Sine, 767 P.2d 499, 502 (Utah 1988); John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205, 1207 (Utah 1987); Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 584 (Utah App. 1992).

All this provision indicates is that Ross retained his right to pursue the consulting agreement that was included in earlier drafts of the contract between the parties. There is no reservation, explicit or implicit, of a right to rescind the agreement entered into, only to pursue a separate right to a consulting agreement.³ However, it is far too great a leap to read the language in question as indicating that by reserving a right to pursue a consulting agreement, Ross also reserved a right to totally rescind the agreement between the parties. We therefore decline to do so.

Since the agreement between Equitable and the selling group unambiguously did not provide for a consulting agreement, the trial court did not err in granting Equitable's second motion for summary judgment on David E. Ross's remaining claim of damages.⁴

ATTORNEY FEES

David E. Ross II appeals the trial court's award of attorney fees to Equitable, claiming that although Equitable is entitled to an award of attorney fees with regard to its claim for breach of contract, it is not entitled to those fees incurred in defending against Ross's claim for rescission. Equitable responds that since the contract between the parties provided for such fees, and since the two issues are, in essence, the same issue, the trial court properly awarded it attorney fees.

In Utah, attorney fees are awarded only if authorized by statute or contract. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); accord Cottonwood Mall Co. v. Sine, 830 P.2d 266, 269 (Utah 1992). If provided for by contract, attorney fees are awarded in accordance with the terms of that contract. Dixie State Bank, 764 P.2d at 988. Although such an award is a matter of legal right, it must be reasonable and supported by adequate

3. Additionally, we note that our decision in this matter in no way forecloses Ross's right to pursue that claim.

4. Moreover, even were we to find that the agreement between the parties was ambiguous, we would nonetheless have to rule against Ross, given the well-settled rule that ambiguous contracts must be construed against the drafter. See, e.g., Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982) ("The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement."); Parks Enters., Inc. v. New Century Realty, Inc., 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against the drafter.").

evidence. Hoth v. White, 799 P.2d 213, 219 (Utah App. 1990). Determination of such fees is within the sound discretion of the trial court, and will not be overturned unless there is a showing of a clear abuse of discretion. Dixie State Bank, 764 P.2d at 989. Furthermore, we "will presume that the discretion of the trial court was properly exercised unless the record clearly shows to the contrary." Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984) (quoting State ex rel. Road Comm'n v. General Oil Co., 22 Utah 2d 60, 62, 448 P.2d 718, 719 (1968)).

In the case at bar, the parties' contract provides:

In the event any party hereto alleges a breach or violation of the terms and conditions of this Agreement by another party, the prevailing party to such resulting action shall have a right to recover from the 'non-prevailing party any and all costs and expenses, including reasonable attorneys' fees, incurred in the defense or pursuit of said action.

The plain language of the contract provides that the prevailing party has a right to an award of attorney fees incurred in the pursuit or defense of an action arising from a claimed violation of the contract. Since Equitable incurred fees both in pursuing its claim for breach of contract and in defending against David E. Ross II's claim for rescission, it is clearly entitled to an award of attorney fees in regard to both actions. Thus, the trial court did not abuse its discretion in awarding attorney fees in accordance with the terms of the parties' contract.

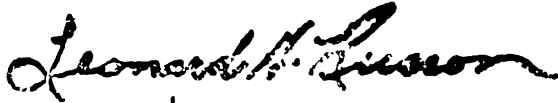
Ross also argues that the trial court abused its discretion in determining that Equitable's requested attorney fees were reasonable. As to the reasonableness of the attorney fees awarded by the trial court, determination of such fees is within the sound discretion of the trial court, so long as the fees are supported by the evidence in the record. Baldwin v. Burton, No. 900339, slip op. at 17 (Utah February 19, 1993) (footnotes omitted). Among the factors to be considered by the trial court in considering the reasonableness of the fee are "the extent of services rendered, the difficulty of the issues involved, the reasonableness of time spent on the case, fees charged in the locality for similar services, and the necessity of bringing an action to vindicate rights." Id. at 17-18 (footnote omitted).

In the case at bar, the trial court's determination is amply supported by the evidence and appears to be reasonable, especially in light of the fact that Equitable filed an attorney

fees affidavit with detailed billing statements attached, which strictly complied with Rule 4-505 of the Utah Code of Judicial Administration. Since the record supports the trial court's award of attorney fees in this case, we cannot say that the trial court committed a clear abuse of discretion in determining that the said fees were reasonable.⁵

CONCLUSION

For the aforementioned reasons, we conclude that the trial court did not err in granting Equitable's motions for summary judgment, and did not abuse its discretion in awarding Equitable attorney fees under the contract. Accordingly, we affirm.

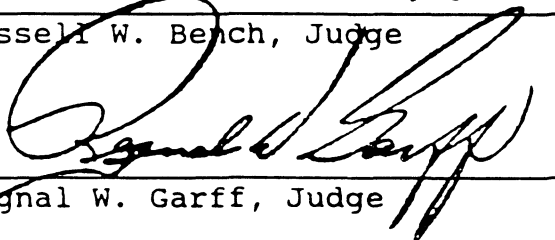


Leonard H. Russon,
Associate Presiding Judge

WE CONCUR:



Russell W. Bench, Judge



Reginal W. Garff, Judge

5. This is particularly true considering the fact that the basis of Ross's opposition to the reasonableness of the award of attorney fees, that Equitable should have filed another motion for summary judgment as to Ross's remaining claims instead of going to trial, is, as noted by the trial court, a somewhat disingenuous position for a party bringing a claim in good faith to take.

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I. JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(k).

II. STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

At the trial court level Judge Sawaya entered five rulings against plaintiffs.¹ Although plaintiffs' Notice of Appeal states that they intend to appeal each of these rulings, their statement of the issues, standard of review, and argument do not fairly focus on the nature of each trial court ruling.

A. CLASS ACTION CERTIFICATION

In the trial court's first ruling against the plaintiffs, Judge Sawaya denied plaintiffs' request to certify this case as a class action. Judge Sawaya first denied the request without oral argument. Order, R. 084. Plaintiffs renewed their Motion and requested an opportunity to more fully brief the case law. Motion, R. 142. Judge Sawaya granted the request and allowed plaintiffs to file an exhaustive Memorandum of Points and Authorities, R. 103, and to make oral argument. He

¹ Plaintiffs/Appellants will be referred to throughout this brief as plaintiffs. Defendants/Appellees will be referred to throughout as defendants. The term "defendants" refers collectively, unless otherwise designated, to Equitable Life and Casualty Insurance Company, Insurance Investment Company, R. Earl Ross, and E. Roderick Ross.

then denied class action certification a second time. Order, R. 218.

Judge Sawaya's decision on class action status can only be reversed when it is shown that the trial court misapplied the law or abused its discretion. Call v. City of West Jordan, 727 P.2d 180 (Utah 1986).

B. SUMMARY JUDGMENT MOTIONS

1. First Summary Judgment Motion

In the trial court's second ruling against plaintiffs, Judge Sawaya granted defendants' motion for partial summary judgment on plaintiffs' claim that a partial liquidation of Insurance Investment Company ("IIC") had occurred which would entitle plaintiffs as IIC preferred shareholders to distribution rights under the corporation's Articles of Incorporation. Motion for Partial Summary Judgment, R. 269; Minute Entry giving reason for granting Motion, R. 310; Order Granting Partial Summary Judgment, R. 317.

In reviewing this award of partial summary judgment, this Court must consider the evidence in the light most favorable to plaintiffs to determine whether there is a genuine dispute as to any material fact, or whether, even according to the facts as plaintiffs contend, defendants are entitled to judgment as a matter of law. D & L Supply v. Saurini, 775 P.2d 420 (Utah 1989) (quoting Themy v. Seagull Enter., Inc., 595 P.2d 526 (Utah 1975)).

In considering whether there is a genuine dispute as to any material fact, this Court should be aware that virtually every material fact laid out by defendants in their two Motions for Summary Judgment went unchallenged and undisputed. Plaintiffs now attempt, in their brief to this court, to frame issues that by their nature dispute formerly unchallenged facts. Thus, plaintiffs do not properly focus on the proper standard of appellate review of summary judgments.

In deciding whether the trial court properly granted summary judgment as a matter of law, this Court must give no deference to the trial court's view of the law, but should review it for correctness. Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989).

2. Second Summary Judgment Motion

In the trial court's third ruling against plaintiffs, Judge Sawaya granted defendants' second Motion for Summary Judgment that disposed of plaintiffs' remaining claim for breach of fiduciary duty. Summary Judgment Motion, R. 390; Order and Summary Judgment, R. 596. Once again, the facts were undisputed. See Defendants Reply Memorandum, R. 557 at 2. The standard of review is the same as for all summary judgment motions.

C. MOTIONS TO AMEND COMPLAINT AND JOIN ADDITIONAL PLAINTIFFS

In the fourth and fifth rulings against plaintiffs, the trial court denied plaintiffs' Motion to Allow Amended Complaint,

R. 525, and plaintiffs' Motion to Intervene. R. 493. Plaintiffs filed these motions in an apparent response to defendants' second Motion for Summary Judgment. Defendants did not oppose the Motion to Intervene; however, Judge Sawaya denied both the motions to amend and to intervene several weeks after he had granted defendants' second summary judgment motion. Order, R. 603, Order, R. 608. Judge Sawaya's decision to deny plaintiffs' motions to amend and to intervene were matters that were within the broad discretion of the court and should not be disturbed absent an abuse of discretion resulting in prejudice. Chadwick v. Nielsen, 763 P.2d 817 (Utah Ct. App. 1988) (citing Girard v. Appleby, 660 P.2d 245 (Utah 1983)).

III. STATEMENT OF THE CASE

A. MATERIAL UNDISPUTED FACTS

The following material facts were presented in support of defendants' Motions for Summary Judgment. It must again be noted that, although plaintiffs had the benefit of the deposition testimony of E. Roderick Ross and R. Earl Ross prior to defendants filing the second motion for summary judgment, plaintiffs never presented contradictory evidence nor disputed in any other way the following facts as set forth by defendants.²

² Plaintiffs never filed counter affidavits. Although they took the depositions of Earl and Rod Ross prior to the second summary judgment motion, plaintiffs were not able to controvert any of defendants' facts. Plaintiffs' failure to
(continued...)

1. Insurance Investment Company ("IIC") is a Utah corporation in good standing. Pond Complaint ¶ 2 (R. 002); Hyer Complaint in Intervention ¶ 2 (R. 158); Answer ¶ 2 (R. 033); Affidavit of Earl Ross (hereinafter "Ross Aff.") ¶ 2 (R. 474).

2. Equitable Life and Casualty Insurance Company ("Equitable") is a Utah corporation in good standing and a Utah domestic insurance company. Pond Complaint ¶ 2; Hyer Complaint in Intervention; Answer ¶ 2; Ross Aff. ¶ 3.

3. IIC is a holding company which owns a majority of the outstanding Equitable common stock. Ross Aff. ¶ 4.

4. The remaining approximately 20 percent of outstanding Equitable common stock is owned by the public and defendants R. Earl Ross and E. Roderick Ross, R. Earl Ross's four sisters and mother and a trust for the primary benefit of R. Earl Ross's mother (the "Ross Family"). Id. ¶ 5.

5. IIC has two classes of stock, namely voting common that is owned by members of the Ross Family, a family charitable foundation and Equitable, and non-voting preferred stock of which approximately 70 percent is owned by the Ross Family and Equitable and 30 percent is owned by plaintiffs and others. The preferred stock is non-voting and has an annual non-cumulative dividend right of \$.06 per share. Id. ¶ 6.

²(...continued)
controvert defendants' statement of undisputed facts as required by Rule 4-501 of the Rules of Judicial Administration was pointed out to the trial court in defendants' Reply Memorandum of Points and Authorities. See R. 557 at 2.

6. Plaintiff Leontine Pond owns 500 shares of IIC preferred stock. She does not now, nor did she in 1987, own any Equitable stock or IIC common stock. Complaint ¶ 7, 32; Answer ¶ 7; Ross Aff. ¶ 7.

7. Plaintiff Merle Hyer Company owns 1175 shares of IIC preferred stock. It did not in 1987, nor does it today, own any Equitable stock or IIC common stock. Hyer Complaint in Intervention, ¶ 7; Answer to Hyer Complaint in Intervention ¶ 7 (R. 204); Ross Aff. ¶ 8.

8. In October of 1986, Bennett Leasing Company, as part of a hostile takeover attempt, entered into agreements with David E. Ross II, Galen Ross, and Betsy Ross Rapps (collectively the "Selling Group") to purchase their rights in IIC and the Ross Family foundation. If all such rights were acquired and control of the foundation obtained, Bennett Leasing may have acquired control of IIC and hence, control of Equitable. Ross Aff. ¶ 9.

9. Bennett Leasing failed to obtain approval of the Utah Department of Insurance as required by the Utah Insurance Code before staging its takeover attempt. Id. ¶ 10.

10. Bennett Leasing's hostile takeover eventually failed in the summer of 1987, when Equitable purchased all of Bennett Leasing's interest. This purchase was made after the Department of Insurance refused to grant Bennett Leasing the certification required by the Insurance Code. Id. ¶ 11.

11. As a direct consequence of the Selling Group's attempted sale to Bennett Leasing, nine lawsuits were filed in 1986 and 1987, in the Third District Court, involving Bennett Leasing, IIC, Equitable, the Ross Family, and the Selling Group. Id. ¶ 12.

12. The prospects of a hostile takeover and change in management directly contributed to a loss of Equitable's business. From 1986 to 1987, during the Bennett Leasing takeover attempt, Equitable's total premiums dropped 2.6%. From 1987 to 1988, after the situation had stabilized, the total premiums rose 19.4 percent. Id. ¶ 13.

13. Throughout the Bennett Leasing controversy and again in August 1987, Equitable negotiated with the Selling Group to purchase their Equitable stock. Equitable desired to purchase the Selling Group's stock in order to stabilize Equitable, bring an end to mounting litigation, and prevent the prospect of a sale by the Selling Group to another corporate raider. The Utah Department of Insurance encouraged and urged Equitable to purchase the Selling Group's stock. Id. ¶ 14.

14. On or about October 30, 1987, Equitable, under the direction of its Board of Directors, entered into an agreement to purchase 11,802.23 shares of IIC common stock from the Selling Group. Because the Selling Group would not sell this controlling stock unless Equitable purchased all of their stock in all family-related corporations, Equitable also purchased 44,544.37

shares of Equitable common stock, 25,050.66 shares of IIC common stock, 25,050.66 shares of IIC preferred stock, and 9,793.10 shares of National Housing Finance Syndicate (a family owned real estate investment company). Id.

15. IIC was not a party to the Stock Purchase Agreement and played no part in Equitable's decision to purchase the stock. Id. ¶ 15.

B. NATURE OF THE CASE AND DISPOSITION

Both IIC and Equitable are separate and distinct Utah corporations, each with its principal place of business located in Salt Lake City. IIC is a stock holding company that owned less than 80 percent of Equitable common stock before the 1987 purchase, but more than 80 percent of Equitable common stock after the 1987 purchase. Equitable in turn is engaged in the development and marketing of life and health insurance products. Equitable was founded in 1935 as Equitable Mutual Aid Protective Society by Dr. Roderick Earl Ross, the grandfather of the Ross Family. The Ross Family owns or controls all of the IIC's voting stock. Although some of the Ross Family serve on both Equitable's and IIC's Board of Directors, the two boards are not identical.

In October 1986, defendants Rod and Earl Ross, the primary officers of Equitable, became aware that Rod's brother, David Ross, his sister, Betsy Ross Rapps, and their uncle, Galen

Ross (the "Selling Group"), were secretly attempting to sell the control of Equitable to Bennett Leasing Company. At that time, David was the only member of the Selling Group who had any involvement in the management of Equitable. He was on Equitable's board and also served as corporate counsel. The Selling Group represented to Bennett Leasing that their stock, together with their control of a family charitable foundation, would give Bennett Leasing control of IIC and Equitable.

Bennett Leasing failed to comply with the mandatory statutory requirements for taking over an insurance company, in that it failed to obtain approval for the takeover from the Utah Department of Insurance. This approval was necessary for the protection of Equitable's policy holders and public shareholders. As soon as Equitable discovered Bennett Leasing's hostile takeover attempt, Equitable moved under the insurance code to prevent the takeover, based on Bennett Leasing's failure to comply with the statutory requirements. Shortly thereafter, lawsuits were filed as the various factions in the Ross Family, Bennett Leasing, and the Selling Group positioned themselves. Galen Ross was the first to file a lawsuit in an attempt to gain control of the voting rights of the family charitable foundation that owned the controlling interest in IIC. In December 1986, Galen, David, and Betsy filed suit to enjoin the voting of certain stock.

Throughout the spring of 1987, Equitable continued to pressure the Department of Insurance to deny Bennett Leasing the right to stage a takeover. The Utah Insurance Commissioner was finally convinced that Bennett Leasing at that time lacked the ability to successfully operate Equitable and Bennett Leasing's certification was not approved. To prevent a reapplication by Bennett Leasing and in an attempt to acquire the IIC common stock of the Selling Group to prevent future hostile takeovers, Equitable purchased Bennett Leasing's interests in the summer of 1987. Equitable then attempted to exercise Bennett Leasing's agreement with Galen but not David or Betsy. This resulted in another lawsuit by the Selling Group to prevent Equitable from buying only Galen's stock.

By the end of 1987, nine lawsuits had been filed, including a suit by Equitable against Bennett Leasing alleging RICO violations and against David for breach of his fiduciary duties as a director of Equitable. At one hearing, there were no fewer than 23 attorneys representing the different factions.

The insurance business greatly relies upon not only the actual stability of the insurance company, but also the appearance of stability. The Selling Group's hostile takeover attempts damaged Equitable's image of stability and hence its business, particularly its relations with its selling agents.

Ultimately, in August 1987, in an effort to stabilize Equitable and bring an end to the numerous lawsuits, Equitable

began serious negotiations with the Selling Group to purchase the Selling Group's IIC common stock. Attorney Daniel Jackson represented the Selling Group collectively in the negotiations. Initially, Equitable was only interested in purchasing the IIC common stock--the control stock--but the Selling Group refused to deal unless Equitable also purchased all their IIC preferred stock, their Equitable stock, and their stock in another family corporation, National Housing and Finance Syndicate. Ross Aff. ¶ 14, R. 474. Throughout the negotiations with the Selling Group, Equitable's various offers were each based upon a single sum it was willing to pay for the Selling Group's entire stockholdings in all three corporations. The Selling Group then determined, amongst themselves, how they would divide this sum. However, during this time, the individual interests of the Selling Group became so adverse that each member of the group was advised to, and did in fact, retain separate legal counsel.

The negotiations between Equitable and the members of the Selling Group continued over several months and culminated in a Stock Purchase Agreement, dated October 30, 1987. The Utah Insurance Commissioner had repeatedly encouraged such a settlement, and the Commissioner reviewed and formally approved the final agreement. As part of the agreement, all the parties dismissed their lawsuits. It is undeniably clear that the negotiations between Equitable and the Selling Group were conducted at arms length. Indeed, the negotiations were

characterized as "damn bloody". See Affidavit of Daniel Jackson, R. 452. The distance and divisiveness among the parties did not end when the Stock Purchase Agreement was finally closed in December 1987. In fact, at that point David characteristically contended that he was entitled to an additional consulting contract with Equitable valued at \$200,000 as further consideration for his stock. Equitable refused to enter into this separate consulting agreement, resulting in yet another lawsuit as David attempted to rescind.³

Plaintiffs' Claims.

Plaintiffs in the present lawsuit each own shares of IIC preferred stock, but they do not own any shares of Equitable stock or IIC common stock.⁴ They are disgruntled because Equitable did not offer to buy their IIC preferred stock at the time it purchased the Selling Group's stock. Even though they allege a breach of fiduciary duty by Equitable's board of directors, they admit that Equitable "probably paid about the

³ Equitable Life & Casualty Insurance Company v. David E. Ross, II, Civil No. C-8804644, went to trial before Judge Moffat on December 17, 1990. Judgment was entered in Equitable's favor. The case is now on appeal to the Utah Court of Appeals.

⁴ Although plaintiffs allege that their predecessors paid for the IIC preferred stock years ago and that they have been waiting ever since for a return on their investment, plaintiffs never developed this claim during the trial court proceedings. It is just as likely that the stock was issued to insurance policyholders when the corporate structure switched from a mutual insurance company to a stock company in the 1940s. This would explain why plaintiffs' stock is non-voting with only a \$.06 dividend right. See Transcript of Defendants' Motion for Summary Judgment, 11/18/91, R. 740, 5:14-6:6, 15:11-25.

right price" for the stock and that Equitable was advantaged rather than harmed by purchasing the Selling Group's stock. See Plaintiffs' Statement of Answering Points and Authorities in Opposition to Motion to Dismiss, pp. 1-3, R. 87. They also admit that no harm came to Insurance Investment Company as a result of the transaction. Appellant's Brief at 41.

Plaintiffs' prolix Complaint is not divided into separate claims for relief or causes of action.⁵ However, after long examination, it appears plaintiffs' claims are divided into two categories. Plaintiffs' first claim is based on the theory that IIC was partially liquidated when Equitable's assets were used to purchase the Selling Group's stock. A liquidation, if it had occurred, would have entitled plaintiffs, as IIC preferred shareholders, to share in the distribution of the assets of the corporation. Plaintiffs sought injunctive relief on this claim

⁵ The first 22 or so paragraphs in the complaint allege that class action status should be afforded these plaintiffs. Mrs. Pond's motions for class action certification were denied twice by Judge Sawaya.

Paragraphs 26-38 of the Complaint appear to allege breach of fiduciary duties surrounding a tender offer Equitable made to purchase its common stock at \$22.50 a share. This tender offer was independent of the purchase agreement with the Selling Group. Plaintiffs later admitted, however, in Response to Defendants' Requests for Admission that plaintiffs are not making any claim against any defendant on the ground that they have been damaged by the tender offer. Answers to Requests for Admissions No. 47, R. 463.

Paragraphs 39-59 bounce back and forth between plaintiffs' claim that IIC was liquidated and their claim that defendants breached their fiduciary duties. The breach of fiduciary claim appears to be made in paragraphs 53-56.

asking that IIC be further liquidated and that their stock be purchased, or exchanged for Equitable stock. Complaint at 12, R. 013.

The trial court fully disposed of plaintiffs' liquidation claim on October 24, 1990, when it granted Defendants' Motion for Partial Summary Judgment and entered an Order based on the undisputed fact that no liquidation of IIC, as contemplated by the Articles of Incorporation, had occurred. See Minute Entry dated September 25, 1990, R. 310; Order dated October 24, 1990, R. 317.

Plaintiff's second category of claims, alleged in only four paragraphs in the Complaint, is based on a theory of breach of fiduciary duties allegedly owed plaintiffs by certain unspecified defendants in their capacities as directors and majority shareholders. The breach of fiduciary duty allegedly occurred when the unspecified defendants excluded plaintiffs in the distribution and liquidation of IIC assets, referred to in the first claim. Plaintiffs' complaint in this regard is vague; for instance, it does not distinguish between claims made against IIC and those made against Equitable's officers, directors, and shareholders. Complaint ¶ 53-56, R. 002. Plaintiffs' claims were also not pleaded alternatively. As for relief, plaintiffs' demand for mandatory injunctive relief, based on an allegation that they had no adequate remedy at law, related only to their theory of a corporate liquidation. The sole remaining demand for

relief was for punitive damages only, with no demand for general and compensatory damages. Id. at 12.

IV. SUMMARY OF THE ARGUMENT

A. CLASS ACTION CERTIFICATION WAS DENIED BECAUSE IT WAS OBVIOUS THAT THE NUMEROSITY AND TYPICALITY PRONGS WERE NOT MET

Judge Sawaya twice denied plaintiffs' motions for class action certification. It was plainly apparent that the numerosity and typicality requirements of Rule 23(a) of the Utah Rules of Civil Procedure were not met. Despite plaintiffs' written solicitation to all IIC preferred shareholders to join as litigants in this action, only 10 additional shareholders demonstrated any interest. The numerosity requirement requires a demonstration that the proposed class is so numerous that joinder is impracticable. The typicality requirement requires a demonstration that there are other members of the preferred class who have the same grievance as plaintiffs. The limited interest shown by the members of the proposed class demonstrates that the requirements for class action certification were not met.

B. PLAINTIFFS' LIQUIDATION CLAIM WAS DENIED BECAUSE IIC NEVER LIQUIDATED

Judge Sawaya properly held that defendants were entitled to summary judgment denying plaintiffs' liquidation claim because the fact was undisputed that no liquidation of IIC,

as contemplated in its Articles of Incorporation, had ever occurred.

C. THERE WERE SEVERAL GROUNDS TO SUPPORT A DISMISSAL OF PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM

1. Plaintiffs' Claims Fail Because They Are Not Equitable Shareholders As They Suppose.

Plaintiffs' breach of fiduciary duty claim relies on the faulty premise that plaintiffs are Equitable minority shareholders because they own stock in Equitable's holding company, IIC. Equitable and IIC have separate corporate existences which are not altered because the Ross family is involved with both corporations. 6A W. Fletcher, Cyclopedia of the Law of Private Corporations, § 2821 (perm. ed. 1989). Stockholders in a holding company are not stockholders, nor entitled to rights of stockholders in the subsidiary of the holding company. 12B W. Fletcher, Cyclopedia of the Law of Private Corporations, § 5767 (perm. ed. 1984).

IIC had no involvement whatsoever in the stock purchase. The ability of Equitable to act independently of its parent is not affected by the fact that some of the shareholders, officers, and directors of IIC and Equitable are the same. 6A W. Fletcher, Cyclopedia of the Law of Private Corporations, § 2821 (perm ed. 1989).

2. The Purchase of the Selling Group's Stock Was Based on the Business Judgment of Equitable's Board and Did Not Give Rise to a Duty to Purchase Plaintiffs' IIC Preferred Stock.

Equitable's board, according to its best judgment, elected to purchase the selling group's stock to (1) promote an orderly transaction of Equitable's business that had been damaged during the takeover bid; (2) eliminate divided loyalties among the various shareholder factions and assure that the selling group would not participate in another hostile takeover; and (3) bring an end to numerous lawsuits that were pending in the Third District Court. Equitable is entitled to deal selectively with its stockholders and was not required to purchase plaintiffs' stock. Any such decision is measured by the business judgment rule.

3. Plaintiffs Did Not Suffer Direct Damage and Therefore Have No Individual Cause of Action.

The fiduciary relationship of a director or officer of a corporation to shareholders is well recognized; however, that relationship is generally held to be between the directors and shareholders as a whole. Aside from the fact that IIC was not involved, these IIC shareholders cannot in their own right and for their own personal use and benefit, maintain an action for the recovery of corporate funds.

4. Plaintiffs' Demand for Punitive Damages is Not Permitted by Statute.

Plaintiffs' demand for punitive damages only, as to their breach of fiduciary duty claim, is barred by Utah Code Annotated § 78-18-1(1)(a) which forbids an award of punitive damages unless general and compensatory damages are awarded.

D. PLAINTIFFS' PROPOSED AMENDED COMPLAINT WAS FUTILE AND FAILED TO STATE A CLAIM

It was proper to deny plaintiffs' motions to amend the Complaint and to join additional IIC preferred shareholders because the amendment was futile and failed to state a claim upon which relief could be granted. Plaintiffs' proposed claim of oppressive corporate salaries stated a derivative claim belonging to IIC and/or Equitable. Their proposed claim concerning corporate dividends ignored the nature of their 6 percent non-cumulative, non-voting, preferred stock with a \$1.00 par value.

V. ARGUMENT

A. CLASS ACTION CERTIFICATION WAS PROPERLY DENIED

Plaintiffs sought class action certification on the basis that there were 105 IIC preferred shareholders similarly situated.

It appeared to Judge Sawaya that this case was not appropriate for class action status so he twice denied plaintiffs' motion to certify.

Judge Sawaya's observation proved to be correct. During the course of discovery, plaintiffs were provided with IIC's stock ledger. Plaintiffs' counsel wrote a letter to each of the preferred stockholders trying to enlist their support. See letter, R. 576. Only 10 additional IIC preferred shareholders responded with any desire to be included.⁶

1. The Requirements of Rule 23(a) Have Not Been Met.

A class action may be maintained only if four prerequisites have been satisfied. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

Rule 23(a) of the Utah Rules of Civil Procedure states:

(a) **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so **numerous** that joinder of all members is impracticable, (2) there are questions of law or fact **common** to the class, (3) the claims or defenses of the representative parties are **typical** of the claims or defenses of the class, and (4) the **representative** parties will fairly and adequately protect the interests of the class. (emphasis added)

The burden was on plaintiffs to demonstrate that these required prerequisites had been met and that a class action could be maintained. Redhouse v. Quality Food Sales, Inc., 511 F.2d

⁶ These 10 additional preferred shareholders were those who sought to intervene in this lawsuit after defendants filed their second and final motion for summary judgment. When Judge Sawaya denied their motion to intervene, they filed a separate complaint, Broadbent, et al. v. Equitable Life & Casualty, et al., Civil No. 920902649CV. That lawsuit has been stayed upon a stipulation, pending the outcome of this appeal.

230 (10th Cir. 1975); Albertson's Inc. v. Amalgamated Sugar Company, 503 F.2d 459 (10th Cir. 1974); 3B Moore's Federal Practice, ¶ 23.02-2 (2nd Ed.).

While the complaint and plaintiff's Motion to Maintain a Class Action mimicked Rule 23 of the Utah Rules of Civil Procedure, they failed to demonstrate that the prerequisites to the maintenance of a class action had been met. See Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980); Rossin v. Southern Union Gas Co., 472 F.2d 707, 712 (10th Cir. 1973).

a. The Numerosity and Typicality Requirements Were Not Met.

Each requirement of Rule 23(a) must be given an independent meaning. Redhouse v. Quality Food Sales, Inc., 511 F.2d 230 (10th Cir. 1975). The numerosity requirement, Rule 23(a)(1), requires a demonstration that the proposed class is so numerous that joinder is impracticable. Taylor v. Safeway Stores, Incorporated, 524 F.2d 263 (10th Cir. 1975). The Broadbent lawsuit filed by the other preferred shareholders demonstrates that joinder was practical and therefore the numerosity requirement was not met.

The typicality requirement, Rule 23(a)(3), requires that plaintiffs demonstrate that there are other members of the proposed class who have the same or similar grievances as plaintiffs. Certainly plaintiffs' claim cannot be typical of the claims of an entire class if the other members of the proposed class do not feel aggrieved. Plaintiffs needed to demonstrate

that the other members of the class they wanted to represent had the same grievances of which plaintiffs complained. Plaintiffs needed to demonstrate in some manner that other preferred shareholders had a complaint. White v. Gates Rubber Company, 53 F.R.D. 412 (D. Colo. 1971). The letter plaintiffs' counsel sent to all of the other preferred shareholders and the limited interest shown in response demonstrates that the typicality requirement was never met. The non-responding preferred shareholders apparently preferred to retain their stock rather than sell it as proposed in the Complaint.

The record simply will not support a contention that Judge Sawaya misapplied the law or that he abused his discretion. The denial of class action certification must be affirmed.

B. JUDGE SAWAYA PROPERLY DENIED PLAINTIFFS' LIQUIDATION CLAIM

Defendants' first motion for partial summary judgment was intended to dispose of plaintiffs' liquidation claim. Defendants supported their statement of undisputed facts with the affidavit of R. Earl Ross, President, Insurance Investment Company. Plaintiffs never disputed any of these facts. After oral argument, Judge Sawaya found that a liquidation of Insurance Investment Company as contemplated in its Articles of Incorporation had never occurred.

The undisputed facts set out in defendants' memorandum, R. 254, included the following:

1. Insurance Investment Company has never in its corporate existence dissolved or liquidated its assets, wound down its affairs, or ceased to exist as a corporate entity. The sole business activity conducted by Insurance Investment Company is the holding of Equitable Life and Casualty Insurance Company stock. This business activity has in no way been altered as a result of Equitable's purchase of Insurance Investment Company preferred stock from members of the Ross Family. R. Earl Ross Aff. ¶¶ 9, 10 (R. 264).

2. Equitable Life and Casualty Insurance Company has never in its corporate existence dissolved, liquidated its assets, wound down its affairs, or ceased to exist as a corporate entity. Equitable is in the insurance business which business activity has not been diminished in any respect as a result of Equitable's purchase of Insurance Investment Company's preferred stock from members of the Ross Family. Id. ¶¶ 11, 12.

1. No Liquidation of IIC Ever Occurred.

Plaintiffs claimed that a partial liquidation of IIC occurred which triggered certain rights in their favor pursuant to IIC's amended Articles of Incorporation, which read:

In the event of any liquidation, dissolution or winding up of this corporation, the holders of Preferred Stock shall be entitled to be paid in full the par value thereof before any amount shall be paid or any assets distributed to the holders of Common Stock Class "A", and after the payment to the holders of Common Stock Class "A" of an amount equal to the par value of said Common Stock Class "A" the remaining assets of this corporation shall be divided and paid to the holders of

Preferred Stock and the holders of Common Stock Class "A" according to the number of their respective shares.

The second issue raised by plaintiffs' appeal addresses this claim. Plaintiffs never disputed the fact that IIC had never liquidated. Rather, their claim relied on the single premise that Equitable's purchase of the IIC preferred stock constituted a "partial liquidation," although that term is not found in the amended Articles of Incorporation. The term partial liquidation is unique to the tax code and is not a liquidation as contemplated in the amended Articles of Incorporation. Judge Sawaya granted the motion for summary judgment, explaining that a liquidation as contemplated in the Articles of Incorporation had never occurred.

Judge Sawaya's decision is supported by an overwhelming majority of decisions in both federal and state jurisdictions, which hold that to liquidate a business is to assemble and mobilize the corporation's assets, settle with the creditors and debtors, and apportion the remaining assets, if any, among the stockholders or owners. United States v. Metcalf, 131 F.2d 677, 679 (9th Cir. 1942); Rothschild International Corporation v. Liggett Group Inc., 463 A.2d 642, 646 (Ct. Ch. Del. 1983); Schenker v. E.I. duPont de Nemours & Company, 329 F.2d 77, 79 (2d Cir. 1964). A liquidation is the process of reducing assets to cash, discharging liabilities, and dividing surplus or loss. Emory v. United States, 374 F.Supp. 1051, 1055

(E.D. Tenn. 1972). To liquidate is to wind up the affairs of a company by getting in the assets, settling with the debtors and creditors, and appropriating the amount of profit or loss. State ex rel. Gibson v. American Bonding & Casualty Co., 281 N.W. 172, 175 (Iowa 1938). Furthermore, in order to liquidate a business, the business must "cease to exist as a corporate entity." Rothschild International Corporation v. Liggett Group Inc., 463 A.2d 642, 646 (Ct. Ch. Del. 1983). Liquidating a business means permanently terminating the affairs of the business. Ex parte Amos, 114 So. 760, 765 (Fla. 1927).

"Liquidation" is a term of art that describes a situation in which the corporation winds up its affairs and distributes its assets to those entitled to receive them. In re Brock's Estate, 218 A.2d 281, 289 (Pa. 1966). Courts consistently apply this well-defined meaning of liquidation in cases where preferred shareholders claim a right to payment under their respective corporation's Articles of Incorporation. See Fletcher, Cyclopedia Corporations, § 7698 (1979).

Equitable's acquisition of the IIC preferred stock was a mere transfer of stock and clearly does not meet the widely-accepted definition of "liquidation."

2. Plaintiffs' Reliance on the Tax Code is Misplaced.

In defining "liquidation," Plaintiffs rely on cases interpreting the Internal Revenue Code. In fact, plaintiffs cite to over half a dozen such opinions primarily for the proposition

that even if a corporation has not wound up its affairs or "liquidated" in the widely-accepted sense, a partial liquidation--as defined in the Internal Revenue Code--can occur. After referring to nine such cases in their trial court memoranda, plaintiffs surprisingly, but correctly, stated that the IRS definition of partial liquidation does not apply to the present case.⁷

Until fairly recently, how a shareholder couched a payment he received from a corporation had significant tax consequences. If the shareholder received a dividend from the corporation, the payment was considered ordinary income and the shareholder was taxed appropriately according to his individual tax bracket. If, however, the payment was considered as a redemption or a "partial liquidation," then capital gains rates applied and the shareholder was generally taxed at a lower rate. Congress specifically defined "partial liquidation" at 26 U.S.C. § 302(e), a term that seems unique to tax code parlance inasmuch as liquidation is normally an all or nothing affair. Inherent in the tax code definition of a partial liquidation is the notion of a contraction of the corporation's business. Bittker and

⁷ Plaintiffs stated: "Since the instant matter does not solely concern tax matters, the finder of fact will not be confined to the corresponding definitions in deciding whether there has been 'any liquidation' entitling the preferred shareholders to the same payment per share as the common shareholders. Rather, the more general common definitions will apply." Plaintiffs' Memorandum in Opposition to Motion for Partial Summary Judgment, dated August 17, 1990, p. 8, R. 278.

Eustice, Federal Income Taxation of Corporations and Shareholders, ¶ 9.52 (1971). Case law has developed in the tax courts as taxpayers/shareholders have litigated whether a partial liquidation and a contraction in business can occur even if the corporation remains an ongoing concern. A partial liquidation as defined in the tax code has nothing to do with the instant case; but even if it did, there was never a contraction in IIC's business. Instead, the 1987 purchase resulted in IIC owning a larger portion of Equitable. Ross. Aff. R. 264 ¶ 9, 10, R. 264.

The use of the term "liquidate" in IIC's amended Articles of Incorporation necessarily refers to a complete winding up of IIC's business because it calls for preferred shareholders to be paid first upon the event of any liquidation, dissolution, or winding up of the corporation. The same sentence then goes on to provide how all of the "remaining assets" are to be distributed. This could only be referring to the non-tax type of liquidation, i.e., a complete liquidation.

Plaintiffs' reliance on the Internal Revenue Code in this case is simply misplaced. Judge Sawaya properly found, based on the undisputed facts, that no liquidation of IIC, as contemplated in the Articles of Incorporation, had ever occurred. The Summary Judgment must be affirmed.

C. JUDGE SAWAYA PROPERLY DENIED PLAINTIFFS' REMAINING CLAIMS

The third, fourth, and fifth issues raised by plaintiffs' appeal deal with points addressed in defendants' second motion for summary judgment, regarding plaintiffs' remaining claim for breach of fiduciary duties. The motion for summary judgment addressed a number of alternate grounds to defeat plaintiffs' claim. When he granted the motion, Judge Sawaya entered a short minute entry that did not suggest the basis for his decision. The trial court's failure to comply with the last sentence of Rule 52(a) of the Utah Rules of Civil Procedure, requiring a brief written statement of the grounds for its decision, does not make the judgment defective, but, admittedly, it makes this court's task more difficult. Allen v. Prudential Property and Casualty Insurance Company, 839 P.2d 798 (Utah 1992). On appeal plaintiffs have elected to raise each alternative ground upon which defendants relied in their motion. When reviewing Judge Sawaya's decision, this Court must presume the decision to be correct and must search for grounds upon which it may be upheld. Id., citing College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co., 780 P.2d 1241 (Utah 1989). Should the court determine that summary judgment was proper, even if for a reason not assigned by the trial court, then the judgment must be affirmed. Buehner Block Co. v. UWC Associates, 752 P.2d 892 (Utah 1988); Rice Melby Enterprises, Inc. v. Salt Lake County, 646 P.2d 696, 698 n.3 (Utah 1982).

1. The Fact That Plaintiffs Are Not Equitable Shareholders Is Fatal to Their Claim.

While plaintiffs continue to tout that their claims cannot be avoided by corporate artificialities, the facts remain unchanged that (a) Equitable, not IIC, was involved in purchasing the Selling Group's stock, and (b) plaintiffs are not Equitable shareholders. These facts cannot simply be dismissed as immaterial. Plaintiffs, here and before the trial court, cited Brown v. Tenney, 532 N.E.2d 230 (Ill. 1988), as primary support for their contention that as shareholders of a holding company, they are not barred from suing as individual shareholders for actions taken by the subsidiary. Brown v. Tenney addressed whether Illinois corporate law recognizes a shareholder's right to bring a double derivative suit. In a double derivative suit a shareholder of a holding company seeks to enforce a right belonging to the subsidiary, and only derivatively to the holding company.

Brown v. Tenney does not stand for the proposition that shareholders of a holding company are de facto minority shareholders of the subsidiary, or that shareholders of the holding company can bring individual claims against the subsidiary as indirect minority shareholders. In fact, Brown v. Tenney supports Equitable's argument that IIC is the Equitable stockholder, not plaintiffs; and if there is a stockholder claim to be asserted against Equitable, it must be made by the actual

stockholder, and if IIC refuses, then by IIC's shareholders in a derivative action.

The law remains uncontradicted by Brown v. Tenney, or any other case cited by plaintiffs, that plaintiffs, as stockholders in a holding company such as IIC, are not stockholders, nor entitled to the rights of stockholders in the subsidiary. 12B W. Fletcher, Cyclopedia of the Law of Private Corporations, § 5767 (perm. ed. 1984). The separate corporate existence between a holding company and its subsidiary is not disturbed simply because the two corporations are closely held and share some of the same directors, officers, or shareholders.

[A] holding company is generally held not to be doing or transacting business through its subsidiary where the separate corporate entities are maintained. By the same token, the creation of a holding company does not affect the separate and continuing existence of the corporation whose stock it holds, nor is the situation altered simply because the stockholders, directors and other officers of the two companies are identical.

6A W. Fletcher, Cyclopedia of the Law of Private Corporations, § 2821 (perm. ed. 1989).

2. The Law in Massachusetts That in Closely Held Corporations the Corporation Must Ratably Purchase Shares From Minority Shareholders is Not the Law in Utah. The Purchase of the Selling Group's Stock Was Based on the Business Judgment of Equitable's Board and Did Not Give Rise to a Duty to Purchase Plaintiffs' IIC Preferred Stock.

Plaintiffs cite Donahue v. Rodd Electrotpe Co. of New England, Inc., 328 N.E.2d 505 (Mass. 1975), for the proposition that if a closely held corporation purchases shares from its

majority shareholders, it owes an equal opportunity to minority shareholders to ratably sell their shares.⁸ While this may be the law in Massachusetts, it is not the law in Utah, Lochhead v. Alacano, 697 F. Supp. 406 (D. Utah 1988); Nash v. Craigco, 585 P.2d 775 (Utah 1978); In re Black, 787 F.2d 503, 506 (10th Cir. 1986), and represents a rule of law that has been rather soundly rejected. Clagett v. Hutchison, 583 F.2d 1259, 1264 (4th Cir. 1978); McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969).

Equitable's decision to purchase the Selling Group's stock was based on rational and compelling business justifications. Donahue and the other cases cited by plaintiffs all relate to a preferential liquidation or minority shareholder "freeze out," where a majority shareholder caused the corporation to purchase his shares, for no other justification than to favor that majority shareholder. In contrast, Equitable's decision to purchase the Selling Group's IIC common stock was based on several rational and even compelling business justifications: (a) to stabilize control of Equitable, (b) to put an end to the divisiveness among the owners of IIC voting common stock, and (c) to end all ongoing litigation. In order to accomplish this business objective, Equitable was forced to purchase all the Selling Group's stock, including their IIC preferred stock.

⁸ The court must remain cognizant of the fact that it was Equitable that purchased the selling group's stock, not IIC. Plaintiffs are not Equitable shareholders. To extend plaintiffs' argument would require any purchaser of stock to buy out all of the corporation's other shareholders.

In contrast to Donahue and the other cases cited by plaintiffs, the more recent case of Delahoussaye v. Newhard, 785 S.W.2d 609 (Mo. App. 1990), is persuasive. There the directors of a close corporation decided to purchase over half of the corporation's 550,000 outstanding shares from two families represented on the board. The corporation purchased the shares in order to (1) eliminate ongoing dissension on the board; (2) promote orderly transaction of business; and (3) eliminate divided loyalties. Id. Plaintiffs claimed that the directors violated a fiduciary duty when they redeemed shares from shareholders who were also officers and directors, but denied plaintiffs' request to ratably redeem their shares on comparable terms. Id. at 609. The court held that the minority shareholders were not entitled to ratable redemption where directors, for business purposes, redeem some outstanding shares. Id. at 611.

Courts widely recognize that if a corporation's actions are motivated by valid business purposes, the corporation is protected from liability. Because the actions of the Equitable board were motivated by its business judgment that buying out of the dissident stockholders was necessary to maintain the very existence of the corporation, the board is not liable for such a decision. Cheff v. Mathes, 199 P.2d 548, 554 (Del. 1964).

Equitable is entitled to deal selectively with its stockholders and any decision to do so is measured by the

standards of the business judgment rule. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. Supr. 1985). Under the business judgment rule there is the presumption that in making a business decision the directors of Equitable acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. Aronson v. Lewis, 473 A.2d 805, 812 (Del. Supr. 1984). So long as the Equitable Board's decision can be attributed to any rational business purpose, the trial court may not substitute its judgment for that of the board. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. Supr. 1985).

3. **Plaintiffs Have No Claim for Relief Even if There Were a Genuine Issue of Fact Surrounding the Motive for the Purchase of the Selling Group's Stock.**

Plaintiffs had an opportunity to depose Rod and Earl Ross, Equitable's President and Chief Executive Officer, respectively. The Rosses testified about the complicated distribution of IIC voting common stock between the various members of their family including family trusts and charitable foundations. From these facts, plaintiffs inferred that the true reason for the Selling Group stock purchase had nothing to do with the Bennett Leasing takeover; instead, it was a culmination of Rod and Earl Ross' continuing efforts to gain control of Equitable. This, they claim, created an issue of fact and is really the crux of their argument. See Appellants' Brief, ¶ 23 at 9; Id. at 39.

As plaintiffs' theory goes, Equitable's purchase of the Selling Group's stock was supposedly carried out to facilitate Rod and Earl Ross' efforts to gain control of Equitable and not to serve Equitable's best interests according to its directors' business judgment. Therefore, Equitable should also have purchased plaintiffs' stock. The defect in this theory is that it is undisputed that the IIC preferred stock which plaintiffs own, as well as the IIC preferred stock sold by the Selling Group, does not affect the control of Equitable in any way, shape, or form. The IIC preferred stock is non-voting stock. The control of IIC lies in its voting common stock. That was the stock that Bennett Leasing had secretly sought to purchase. The only reason Equitable purchased the Selling Group's IIC preferred stock was because the Selling Group insisted. Equitable had no interest in the preferred stock, its acquisition did nothing to avoid future hostile takeovers, and to infer otherwise is simply illogical.

It is undisputed that the negotiations with the Selling Group were at arms length, and whatever powerplay plaintiffs might wish to infer from the transaction, it is still undisputed that Equitable did not purchase the Selling Group's IIC preferred stock in order to favor the Selling Group over the other IIC preferred shareholders, or to freeze out these preferred shareholders who have never had any control over the corporation.

4. The Law in Utah is That a Cause of Action For Any Breach of Fiduciary Duty by Corporate Officers Belongs to the Corporation and Not to Stockholders Individually.

Defendants argued to the trial court that even if plaintiffs could overcome the facts that (a) Equitable, not IIC, was involved in the Selling Group transaction, and (b) plaintiffs are not Equitable stockholders, plaintiffs still have no individual cause of action for breach of fiduciary duty. In In re Black, 787 F.2d 503 (10th Cir. 1986), the court held that

[u]nder Utah law, a corporate officer owes a fiduciary duty to the corporation and to its shareholders. See Richardson v. Arizona Fuels Corp., 614 P.2d 636, 639 (Utah 1980). However, this duty is owed to the shareholders collectively, and no fiduciary duty is owed to the stockholders individually. Id. at 639-40. Thus Utah follows the general rule that any cause of action "on account of any breach by [corporate officers] of their fiduciary duty as directors and officers . . . belong[s] to the corporation and not to the stockholders individually." Id. at 640. (Emphasis added.)

In Delahoussaye v. Newhard, supra 785 S.W.2d 609, the court reached this same conclusion as to duty to all shareholders. Although the Delahoussaye court held that the corporation's purchase of its stock was motivated by legitimate business purposes, the major rationale for dismissing plaintiffs' claim rested on another legal argument. The court explained that plaintiffs' complaint proceeded entirely on a theory that a breach of fiduciary duty had occurred because the directors redeemed the shares of other minority shareholders and not plaintiffs' shares. Id. at 613. The court rejected that theory,

holding that in the absence of statutory support or some special obligation, plaintiffs' allegations failed to state a cause of action.

The court stated that plaintiffs' complaint was an attempt to allege indirect injury, when direct injury is necessary for plaintiffs to have an individual cause of action.

Id. at 613. The court defined direct injury:

[a]ctions based upon torts where the injury is done directly to an individual shareholder, director or officer as such, depriving him [a shareholder] of his rights, for instance, wrongfully expelling him or refusing to allow him to inspect the corporate books and records, are actions which may be brought by shareholders as individuals . . . Ordinarily an action based on acts relating to the capital stock as an entirety is a corporate cause of action and cannot be sued for by a shareholder merely as an individual.

Id. at 612 (quoting Gieselmann v. Stegeman, 443 S.W.2d 127, 131 (Mo. 1969)).

Like plaintiffs' cause of action in Delahoussaye, plaintiffs' allegations here failed to state a cause of action.

5. **Punitive Damages Cannot be Awarded When No General or Compensatory Damages Are Sought.**

In the action below, plaintiffs asked for two forms of relief based on (a) their "partial liquidation" claim and (b) their breach of fiduciary duty claim. As to their liquidation claim, plaintiffs asked for mandatory injunctive relief against Equitable and IIC only, on the grounds they had no adequate remedy at law. Complaint ¶ 57, R. 002. The relief they sought would have required Equitable to purchase their IIC preferred

stock and related solely to plaintiffs' liquidation claim. The trial court fully disposed of plaintiffs' liquidation claim on October 24, 1990, when it granted Defendants' Motion for Partial Summary Judgment. As to their breach of fiduciary duty claim, plaintiffs directed the claim against officers, directors and shareholders, namely Rod and Earl Ross, not the corporations. Plaintiffs asked for punitive damages only on this claim. Id. at 12.

Utah Code Ann. § 78-18-1(1)(a) forbids an award of punitive damages unless general and compensatory damages are awarded. The statute states:

Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others. (Emphasis added.)

The case of Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978) does not support the contention that plaintiffs were entitled to punitive damages against the Rosses where their liquidation claim sought equity against Equitable and IIC. Plaintiff did not alternatively seek damages against the corporation. Indeed, had plaintiffs been granted the injunctive relief they sought there would have been no other measurable damages.

In Atkin Wright & Miles v. Mountain States Telephone & Telegraph, 709 P.2d 330 (Utah 1985), the Utah Supreme Court, comprised of different members than the Nash court, held unequivocally that punitive damages are not recoverable unless the plaintiff recovers compensatory damages.

In Nash, the court stated that, "[w]hile the cases generally hold that the amount of punitive damages must bear some reasonable relation to the amount of actual damages awarded, this is not necessarily true." But five years later in Cruz v. Montoya, 660 P.2d 723, 727 (Utah 1983), the Court stated more narrowly that the amount of punitive damages is left to the jury's discretion. "However, punitive damages must bear a reasonable relationship to actual damages."

In the present case, plaintiffs stated very clearly that they had no adequate remedy at law. See Complaint, ¶ 57, R. 002. While the Nash decision may permit an award of punitive damages when the only other relief sought against the same defendant is equitable, neither Nash nor the statute permit an award of punitive damages where absolutely no relief other than punitive damages is sought against the other defendants. Plaintiffs' contention that they sought whatever additional relief the court might have chosen to confer, including perhaps compensatory damages from the Rosses, even though their demand was only for punitive damages, is merely an afterthought which

contradicts paragraph 57 of their complaint and ignores their failure to alternatively demand compensatory damages.

D. JUDGE SAWAYA DID NOT ABUSE HIS DISCRETION WHEN HE DENIED PLAINTIFFS' MOTION TO AMEND THE COMPLAINT AND TO ALLOW INTERVENTION OF ADDITIONAL PREFERRED STOCKHOLDERS

Plaintiffs filed their motions to allow an amended complaint and to intervene as a response to defendants' second and final motion for summary judgment. In fact, Judge Sawaya did not rule on plaintiffs' motions until he had granted the motion for summary judgment that dismissed plaintiffs' remaining claim. The court did not abuse its discretion in denying an amendment after dismissing all of the existing claims.

A trial court may properly deny a motion to amend if it determines the proposed amendment is futile. See Bache Halsey Stuart Shields v. Tracy Collins Bank & Trust, 558 F.Supp. 1042, 1044 (D. Utah 1983) (holding that leave to amend should be denied when the proposed amendment is frivolous, legally insufficient, or subject to dismissal); Conrad v. Imatani, 724 P.2d 89 (Colo. Ct. App. 1986) (holding that the trial court did not abuse its discretion when it denied plaintiff's motion to amend when summary judgment motion established proposed amendment was futile). See also De Robert v. Gannett Corp., Inc., 551 F.Supp. 973 (D. Hawaii 1982) (holding that leave to amend was properly denied when proposed amendment would be futile); Burt v. Blue

Shield of Southwest Idaho, 591 F.Supp. 755 (S.D. Ohio 1984)

(stating these principles).

The proposed Amended Complaint was futile and subject to dismissal because it reiterated the identical claims that had already been adjudicated (claims for class action certification, liquidation of IIC and breach of fiduciary duty). Furthermore, the proposed amended complaint asserted claims upon which relief could not have been granted.

1. **Plaintiffs' Claim of Alleged Oppressive Conduct Failed to State a Claim Upon Which Relief May Be Granted.**

Plaintiffs' proposed Amended Complaint added a second cause of action that was not a part of their earlier complaint, in which they alleged that IIC must be liquidated pursuant to Utah Code Ann. § 16-10-92(a) because of a continuing pattern of conduct that was oppressive to IIC minority shareholders. Plaintiffs alleged that IIC's dividend policy was oppressive and that IIC's officers' salaries were excessive. This second cause of action was futile because both claims failed to state a claim upon which relief could be granted.

a. **Plaintiffs' Stock is 6% Non-Cumulative Preferred Stock.**

Plaintiffs complained that IIC rarely declared a dividend and that when it did plaintiffs only received a paltry \$.06 per share. They also claimed that the past dividends represented only a small fraction of the corporation's assets. Proposed Amended Complaint ¶ 79-82, R. 529. Apparently,

plaintiffs have never fully understood that their stock is 6% non-cumulative, non-voting, preferred stock with a \$1.00 par value. By definition, if a dividend is declared by IIC's board of directors, preferred shareholders are entitled, if the declared dividend is large enough, to 6% of the \$1.00 par value or \$.06 per share, and no more. After the preferred shareholders receive their dividend, the common shareholders receive whatever remains of the declared dividend. If the declared dividend is insufficient to pay \$.06 per share to the preferred stockholders, or if there is no dividend declared, the shortfall does not carry forward to the next declared dividend because the preferred stock is non-cumulative. The declaration of dividends, if allowed by the financial stability of the corporation, is permissive, not mandatory, Utah Code Ann. § 16-10-41 and Utah Code Ann. § 16-10a-64D⁹, and rests within the sound discretion of the board of directors. As plaintiffs' "seminal" case, Donahue v. Rodd Electrotypes of New England, Inc., 328 N.E.2d 505 (Mass. 1975), states,

The courts prefer not to intervene . . . with the sound financial management of the corporation by its directors, but declare as a general rule that the declaration of dividends rests within the sound discretion of the directors . . .

. . . Plaintiffs who seek judicial assistance against corporate dividend or employment policies do not prevail.

⁹ Until recent amendments were made to the Corporations Code, dividends were based on the unreserved and unrestricted surplus of the corporation. Id.

328 N.E.2d at 513, 514.

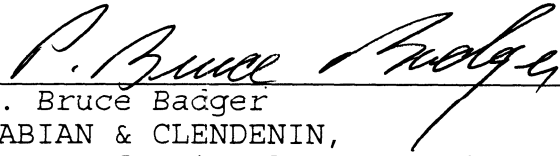
b. **A Claim of Excessive Salaries is Derivative and Belongs to the Corporation.**

Plaintiffs' claim of excessive officer salaries, Proposed Amended Complaint ¶ 83-87, R. 529, states a derivative claim belonging to IIC and/or Equitable. Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980); Bessett, et al. v. Bessett, 434 N.E.2d 208 (Mass. 1982). It was clear that plaintiffs were attempting to improperly bring the claim as an individual shareholder action. Moreover, plaintiffs' claim was based on a ridiculous allegation that in 1957, two lawsuits were filed against IIC alleging excessive officer salaries. Plaintiffs alleged that the unsubstantiated allegations in a 35 year old lawsuit point to a continuing practice of excessive salaries for both IIC and Equitable which justify liquidating the corporation, although plaintiffs readily admitted they have absolutely no idea what salaries either corporation currently pays its officers. Because this was at best a derivative claim, and at worst was founded on a ridiculous assumption that 35-year old allegations justify corporate liquidation, the claim would have been subject to immediate dismissal if leave had been granted to file the Amended Complaint.

VI. CONCLUSION

For each reason set forth in this brief, Judge Sawaya's rulings should be affirmed.

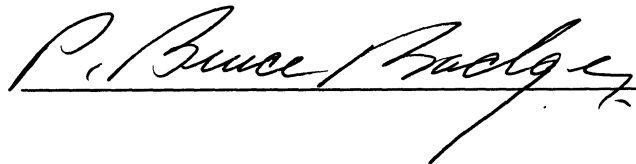
DATED this 24 day of February, 1993.


P. Bruce Badger
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Appellees
Equitable Life & Casualty Insurance
Company, Insurance Investment
Company, R. Earl Ross, E. Roderick
Ross

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of February, 1993, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing Appellee's Brief, to:

Lynn P. Heward
Delwin T. Pond
923 East 5350 South #E
Salt Lake City, Utah 84117



ADDENDUM

COPY

Jay B. Bell, #A4791
P. Bruce Badger, #A4791
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Equitable Life & Casualty
Insurance Company, Insurance Investment
Company, R. Earl Ross, E. Roderick
Ross
Twelfth Floor
215 South State Street
P. O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LEONTINE C. POND, a holder of Preferred)
Stock in Insurance Investment Company,)
a Utah Corporation, on behalf of herself)
and other similarly situated holders of)
such stock,)

Plaintiff,)

vs.)

O R D E R

EQUITABLE LIFE AND CASUALTY INSURANCE)
COMPANY, a Utah Corporation, INSURANCE)
INVESTMENT COMPANY, a Utah Corporation,)
R. EARL ROSS, E. RODERICK ROSS, GALEN J.)
ROSS, DAVID E. ROSS II, DIANE ROSS)
WORTHEN, BETSY ROSS RAPPS, CONNIE ROSS,)
and Does 1 through 20,)

Defendants.)

Civil No. 890905755CV

Judge James S. Sawaya

Plaintiff's Renewed Motion for Maintenance As A Class
Action came on for hearing on June 4, 1990, at 2:00 p.m. The
plaintiff was represented by Lynn P. Heward, Esq. The defendants


Equitable Life & Casualty Insurance Company, Insurance Investment Company, R. Earl Ross and E. Roderick Ross were represented by P. Bruce Badger, Esq. The court having considered the memoranda filed by counsel, having heard argument and being otherwise fully advised in the premises, hereby enters its order consistent with its minute entry dated June 14, 1990.

It is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's Renewed Motion for Maintenance As A Class Action is denied.

DATED this 20 day of June 1990.

BY THE COURT:



James S. Sawaya
District Court Judge

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LEONTINE C. POND and MERLE G.)
HYER COMPANY,)
)
Plaintiffs,)
)
v.)
)
EQUITABLE LIFE AND CASUALTY)
INSURANCE COMPANY, a Utah)
Corporation, INSURANCE)
INVESTMENT COMPANY, a Utah)
Corporation, R. EARL ROSS,)
E. RODERICK ROSS, GALEN J. ROSS)
DAVID E. ROSS II, DIANE ROSS)
WORTHEN, BETSY ROSS RAPPS,)
CONNIE ROSS, and Does 1 through)
20,)
Defendants.)

O R D E R

Civil No. 890905755CV
Judge James S. Sawaya

Defendants Equitable Life & Casualty Insurance Company, Insurance Investment Company, R. Earl Ross and Roderick E. Ross' Motion for Partial Summary Judgment came on for hearing before The Honorable James S. Sawaya on September 24, 1990, at 2:00 p.m. The moving defendants were represented by Jay B. Bell and P. Bruce Badger. The plaintiff was represented by Lynn Heward. The court heard oral argument and having considered the respective memoranda filed by the parties enters this order consistent with the court's minute entry dated September 25, 1990, and hereby

ORDERS, ADJUDGES and DECREES that the Motion for Partial Summary Judgment is granted. The complaint as to the moving

defendants is dismissed insofar as plaintiffs' claims and demand for relief rely upon a liquidation of Insurance Investment Company.

DATED this 24 day of October 1990.

BY THE COURT:

JS
James S. Sawaya
District Court Judge

APPROVED AS TO FORM:

Lynn Heward
Lynn Heward
Attorney for Plaintiffs

P. Bruce Badger
P. Bruce Badger
Attorney for
Equitable Life and Casualty
Insurance Company,
Insurance Investment Company,
R. Earl Ross and Roderick E.
Ross

PBB:101890B

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LEONTINE C. POND and MERLE G.
HYER COMPANY, a Utah corporation,
holders of Preferred Stock in
Insurance Investment Company,
a Utah Corporation, on behalf of
themselves and other similarly
situated holders of such stock,

Plaintiffs,

v.

EQUITABLE LIFE AND CASUALTY
INSURANCE COMPANY, a Utah
Corporation, INSURANCE
INVESTMENT COMPANY, a Utah
Corporation, R. EARL ROSS,
E. RODERICK ROSS, GALEN J. ROSS
DAVID E. ROSS II, DIANE ROSS
WORTHEN, BETSY ROSS RAPPS,
CONNIE ROSS, and Does 1 through
20,

Defendants.

ORDER AND SUMMARY JUDGMENT

Civil No. 890905755CV

Judge James S. Sawaya


The Motion for Summary Judgment, dated September 24, 1991, filed by defendants Equitable Life & Casualty Insurance Company ("Equitable"), Insurance Investment Company ("ICC"), R. Earl Ross and E. Roderick Ross, came on for hearing on Monday, November 18, 1991, at 2:00 p.m. Plaintiffs, Leontine Pond and Merle Hyer Company were represented by Lynn Heward. Defendants, Equitable, IIC, R. Earl Ross and E. Roderick Ross were represented by P. Bruce Badger and Jay B. Bell, of Fabian & Clendenin.

The court heard argument of counsel and being fully advised in the premises and having taken the matter under advisement, enters the following Order and Judgment consistent with its minute entry dated November 21, 1991. It is hereby

ORDERED, ADJUDGED and DECREED that defendants Equitable, ICC, R. Earl Ross and E. Roderick Ross's Motion for Summary Judgment dated September 24, 1991 is granted. All remaining claims in Leontine Pond's Complaint, and plaintiff, Merle Hyer Company's Complaint-in-Intervention, addressed to these moving defendants, which were not previously dismissed pursuant to an earlier Order of this court, dated October 24, 1990, are now dismissed with prejudice.

DATED this 24th day of December 1991.

BY THE COURT:



James S. Sawaya
District Court Judge

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that on the 5th day of December 1991, a true and correct copy of the foregoing ORDER AND SUMMARY JUDGMENT was mailed, first class, postage prepaid to:

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LEONTINE C. POND and MERLE G.
HYER COMPANY, a Utah corporation,
holders of Preferred Stock in
Insurance Investment Company,
a Utah Corporation, on behalf of
themselves and other similarly
situated holders of such stock,

Plaintiffs,

v.

EQUITABLE LIFE AND CASUALTY
INSURANCE COMPANY, a Utah
Corporation, INSURANCE
INVESTMENT COMPANY, a Utah
Corporation, R. EARL ROSS,
E. RODERICK ROSS, GALEN J. ROSS
DAVID E. ROSS II, DIANE ROSS
WORTHEN, BETSY ROSS RAPPS,
CONNIE ROSS, and Does 1 through
20,

Defendants.

ORDER DENYING MOTION TO
INTERVENE

Civil No. 890905755CV

Judge James S. Sawaya

Consistent with the court's Minute Entry of December
24, 1991, it is hereby

ORDERED, ADJUDGED and DECREED that applicants' Motion
to Intervene is denied.

DATED this 30 day of Dec 1991.

BY THE COURT:

JS
James S. Sawaya
District Court Judge

COPY

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LEONTINE C. POND and MERLE G.
HYER COMPANY, a Utah corporation,
holders of Preferred Stock in
Insurance Investment Company,
a Utah Corporation, on behalf of
themselves and other similarly
situated holders of such stock,

Plaintiffs,

v.

EQUITABLE LIFE AND CASUALTY
INSURANCE COMPANY, a Utah
Corporation, INSURANCE
INVESTMENT COMPANY, a Utah
Corporation, R. EARL ROSS,
E. RODERICK ROSS, GALEN J. ROSS
DAVID E. ROSS II, DIANE ROSS
WORTHEN, BETSY ROSS RAPPS,
CONNIE ROSS, and Does 1 through
20,

Defendants.

ORDER DENYING MOTION TO
AMEND COMPLAINT

Civil No. 890905755CV

Judge James S. Sawaya

Consistent with the court's Minute Entry of January 14,
1992, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiffs' Motion
to Amend Complaint is denied.

DATED this 21 day of January 1992.

BY THE COURT:

James S. Sawaya
District Court Judge