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Jon and Elizabeth Triesault, Raymon and Stephanie Bori, individuals, Imagination Theaters, Inc., a corporation, and Imagination Theaters Holdings, L.L.c., a limited liability company v. The Greater Salt Lake Business District, a Utah corporation, doing business as Deseret CDC : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

.....

Oral argument requested

Appeal from the final Order of the Fourth Judicial District Court
of Utah County, State of Utah
The Honorable Fred D. Howard, District Court Judge

Attorneys for plaintiffs-appellants

FILED
UTAH APPELLATE COURTS
APR 18 2005

**JON and ELIZABETH TRIESAULT,
RAYMON and STEPHANIE BORI,
individuals, IMAGINATION
THEATERS, INC., a corporation, and
IMAGINATION THEATERS
HOLDINGS, L.L.C., a limited
liability company,**

V.

Defendants-Appellees.

Oral argument requested

Attorneys for plaintiffs-appellants

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I.
Deseret's Role In The SBA Loan Process

The essence of this case is that Deseret took plaintiffs on as a client. Plaintiffs' evidence, which must be as taken true, shows that Deseret offered to provide expert advice to plaintiffs and represent them before the SBA, much the same as lawyers, accountants and stock brokers advise their clients and then represent their interests in the relevant forum. Having taken on this role, Deseret should owe the same duty of loyalty that other expert advisors and agents owe to their clients.

Much of the murkiness about the nature of Deseret's role stems from the fact that SBA loans, unlike commercial loans, are three-party transactions. They involve a borrower (plaintiffs), a lender (Deseret and Stearns Bank), and a guarantor (the SBA). The SBA's guarantee is the key to transaction, because it means that if the borrower defaults, the investors in the debenture that fund the loan to the borrower are guaranteed repayment of the debenture by the federal government. The central role of the SBA's guarantee is reflected in the fact that plaintiffs never applied to Deseret for their loan. They applied to the SBA. (Rec. 000212, 000213) Once the SBA approved plaintiffs' application and agreed to provide the loan guarantee, the loans from Deseret and Stearns Bank followed as a matter of course.

The three-party nature of this transaction is critical because it exposes the dual nature of Deseret's role. Deseret had one role to play as a lender – it issued the debenture to raise the necessary funds and then loaned those funds to plaintiffs. It had another role to play in securing the SBA guarantee for plaintiffs. Consequently, the fact that Deseret and plaintiffs

had a borrower/lender relationship is irrelevant. This case is premised on the role played by Deseret in connection with the SBA loan guarantee.

It is undisputed, in this regard, that Deseret assisted plaintiffs in applying to the SBA for the loan guarantee and handled all communications with the SBA on plaintiffs' behalf. Indeed, the trial court viewed Deseret as plaintiffs' "voice" before the SBA. The central question presented by this appeal, therefore, is whether Deseret, by assisting plaintiffs in securing the SBA guarantee and acting as plaintiffs' "voice" before the SBA, became plaintiffs' agent and trusted advisor, as plaintiffs contend, or whether Deseret was instead nothing more than a middleman bringing the two parties together, as the trial court thought.

II.

There Is Ample Evidence Supporting The Claim That Deseret Was Plaintiffs' Agent With Respect To SBA

Deseret's central contention is that when working with plaintiffs on the SBA loan guarantee, it was a middleman, not plaintiffs' agent:

As a CDC, Deseret does not petition the SBA on behalf of the applicant. Rather, it assists in the loan application process, interacting with both the SBA and the borrower on the loan.... (Deseret Br. at 25)

What the evidence actually shows, however, is that Deseret went to the SBA as plaintiffs' representative, and not as a middleman bringing the parties together. Consider the following examples of Deseret's conduct:

Submission of the SBA application: The evidence is undisputed that Deseret worked very closely with plaintiffs on every aspect of the preparation of their SBA application, and then submitted that application to the SBA on plaintiffs' behalf. There is no parallel evidence of Deseret working with the SBA on the application. The suggestion that,

with respect to the application, Deseret “interacted with both the SBA and the borrower,” is therefore nothing more than an unsupported conclusion. The evidence concerning the application is all one-sided; Deseret worked intimately with the plaintiffs, without any evidence showing that it worked with the SBA.

The evidence concerning the application further shows that Deseret was subject to plaintiffs’ control, because Deseret submitted *plaintiffs’* loan application to the SBA. (Rec. 000212, 000213) While Desert advised and instructed plaintiffs how to fill out this application, Deseret ultimately submitted plaintiffs’ application. Deseret was not an independent actor, free to submit anything it chose to the SBA; Deseret submitted the application that plaintiffs chose to submit. A “middleman” would attempt to bring plaintiffs and the SBA together, and would be free to do whatever it wanted in attempting to achieve that goal. A “middleman” could make any presentation it wanted to the SBA; it could even seek a loan different than what plaintiffs wanted, and then attempt to convince plaintiffs that this is the loan they should take. The evidence shows, therefore, that while plaintiffs were dependent on Deseret’s expert advice, Deseret was representing plaintiffs before the SBA.

December 5, 1997 letter from Deseret to the SBA (Rec. 000247): Due to cost increases on plaintiffs’ project, a request had to be made to the SBA to approve changes in the guarantee. The December 5 letter, written by Deseret to the SBA, requests the required approval from the SBA. The letter clearly shows that Deseret was acting as plaintiffs’ representative to the SBA. There are no parallel letters in which Deseret transmitted communications from the SBA to plaintiffs. Thus, this letter refutes the notion that Deseret

was a middleman bringing plaintiffs and the SBA together. The letter also shows that Deseret was subject to plaintiffs' control. In writing this letter on plaintiffs' behalf, Deseret was doing exactly what plaintiffs wanted it to do; requesting the necessary loan modifications necessitated by plaintiffs' cost overruns.

May 6, 1998 letter: (Rec. 000245) Due to a dispute with one of the project's contractors, plaintiffs' project incurred some delay. This letter, once again written by Deseret to the SBA, asks the SBA for a six month extension of the loan authorization. A reasonable reading of this letter, like the December 5 letter, is that Deseret was once again communicating plaintiffs' wishes to the SBA.

August 10, 1999 letter: (Rec. 000243) This is yet another letter by Deseret to the SBA, this time requesting a modification to the SBA guarantee in order to permit plaintiffs to sell some land to a neighboring business. It is difficult, if not impossible, to read this and the communications described above and conclude that Deseret was a middleman bringing plaintiffs and the SBA together. The much more natural inference is that Deseret was communicating plaintiffs' needs to the SBA as plaintiffs' representative.

Summary judgment can be granted only if the undisputed facts show that Deseret was acting as a middleman and not as plaintiffs' representative. While the facts would appear to show the opposite – that it was undisputed that Deseret was in fact plaintiffs' representative and not a middleman– there are at a minimum different ways of reading the facts, and thus summary judgment was inappropriate.

In the above discussion of the evidence, at times plaintiffs stated that Deseret was plaintiffs' "representative," while at times stating that Deseret was subject to plaintiffs'

“control.” The trial court focused on the later concept, finding against plaintiffs because they allegedly did not “control” Deseret. In fact, “representation” and “control” are two sides of the same coin. To be someone’s representative is to be controlled by them. The essence of representing someone is that you present *their* position to others, not your own position. This is shown by the standard definition of agency, 2A *Corpus Juris Secundum*

Agency § 1:

The relationship of principal and agent exists only where one party exercise a right of control over the actions of another and those actions are directed toward attainment of the objective which the first seeks. Stated another way, an agency relationship exists when one person is authorized to represent and act for another in dealings with third parties.

This definition shows that being “authorized to represent” someone is the same as acting under that other person’s “control.” *See also*, 3 *Am.Jur.2d* Agency §1. One can see this concept reflected in most common agent situations. Thus, for example, when a client hires a lawyer, they hire the lawyer to “represent” them. While there may be no document or explicit statement that the lawyer, when appearing in court, is controlled by the client, the very nature of representing someone means that the lawyer can only do what the client wants, and is thus “controlled” by the client. So too here, because Deseret represented plaintiffs before the SBA, and was thus controlled by plaintiffs in its actions before the SBA.

Deseret reads the evidence another way, arguing that because plaintiffs were dependent on Deseret’s advice, it “controlled” plaintiffs and not the other way around. In so arguing, Deseret misses the fact that one can control an agent while at the same time being dependent on the agent’s advice. This is not only possible, it is the norm. Consider just about any kind of common agent such as a lawyer, stock broker or insurance agent.

Many clients of these agents are completely reliant on the agent's advice. Lawyers' clients, for example, typically have no idea how to proceed with a lawsuit. After the lawyer provides his or her expert advice, they are "controlled" by their client in the sense that they can only pursue such claims as they have been authorized to do pursue by their clients. Similarly, when athlete hire agents to negotiate their contracts, the athletes may have no idea what kind of contracts they should ask for (other than ones that will make them rich), and they will frequently be completely dependent on their agents' advice. The athletes' agents are nonetheless subject to the athletes' "control," and are the agents of the athletes, because they can only negotiate what their clients want. Lawyers, stock brokers, insurance agents and athletes' agents may tell their clients what they need to do, but they must also ultimately act in accordance with their clients' interests. Thus, virtually all agents are subject to their clients' control, even though their clients may be wholly dependent on their expertise and advice.

The Restatement (Second) of Agency points out the great flexibility that agents are given, due to their expertise:

An attorney is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to control by the court, if he is not permitted to act as he thinks best. A real estate broker selling on commission has the right to use customary business methods without interference by the principal. § 385, Comment a.

Thus, the alleged contradiction between plaintiffs' dependence on Deseret's expertise, and the claim the Deseret was plaintiffs' agent, is non-existent. In most typical agency situations the principal hires the agent precisely because that person has an expertise the principal lacks, and thus the principal needs someone he or she can trust to handle a

particular matter. Otherwise, the principal would attend to his or her own affairs, without hiring the agent.

III. **The SBA's Standard Operating Procedure Does Not Support The Summary Judgment**

Plaintiffs stated the following in their opening brief:

If Deseret acted as an agent, federal regulations cannot undo that, and if Deseret did not act as an agent, federal regulations cannot make them an agent.

Deseret has no response to this. Consequently, Deseret's reliance on the SBA's Standard Operating Procedure ("SOP") is irrelevant. In *Vina v. Jefferson Ins. Co. of New York*, 761 P.2d 581 (Utah App. 1988), the court was faced with the similar question of whether an insurance salesman was an agent of the insurers or the insureds. After finding that, for statutory purposes, the salesman was not an agent under the Utah code, the court held:

We must also consider whether Dunn was the agent of Jefferson and Transwestern or of Vina under general agency principles, because the insurance code's purpose is "primarily for the purpose of regulating insurance companies, agents, brokers, solicitors and adjusters" and does not supplant ordinary legal principles of agency. [citation omitted] The question of whether an insurance agent is the agent of the insurer or the insured is a question of fact.

Id. at 584.

Court's defer to regulations when the question is how to interpret a statute. If the administration of a statute has been delegated to a particular agency, courts will defer to that agency's interpretation ***of the statute***. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (U.S. 1984). There is no authority, however, supporting the notion that courts should defer to an agency's position on a common law

claim. Whether Deseret was an agent must turn on the specific facts of the relationship between plaintiffs and Deseret, and a statement by the SBA cannot alter those facts. Thus, even if the statement in the SBA's SOP actually supported Deseret's position (which it does not), it would not affect the analysis of the issue under Utah common law.

Furthermore, the authority Deseret relies upon is not a federal regulation, but rather an internal operating manual. No legal authority has been cited for the proposition that courts should defer to statements made in such documents. Indeed, the SBA's own statement of the purpose the SOP shows the limited intended application of the document:

This standard operating procedure (SOP) stipulates the policy and procedures for the processing of all requests for financial assistance under the Agency's business loan programs. * * * This SOP is written to and for the SBA field personnel engaged in the processing of business loans, including both the recommending and approving officials.¹

The SOP is therefore meant purely as an internal guide for SBA employees engaged in loan processing. It can have no effect on the analysis of the common law claims at issue in this lawsuit.

Finally, plaintiffs demonstrated in their opening brief that: (1) the SOP does not mean that certified development companies are not agents for loan applicants, and furthermore, (2) even if the SOP did say that, it would conflict with a federal regulation that explicitly states that those assisting borrowers in preparing applications are agents of those applicants. (See Br. at 31-32) There is no need to repeat those arguments, which show that if the statements of the SBA have any impact on this claim, the federal regulation, which is clearly the more important statement, strongly supports plaintiffs' position.

¹ [sba.gov/sops/5050/sop50104e.pdf](https://www.sba.gov/sops/5050/sop50104e.pdf), at page 1.

IV.
There Is No Evidence Supporting Deseret's
Assertion That It Was The SBA's Agent.

Although the trial court ruled that Deseret was a middleman that brought plaintiffs and the SBA together, Deseret contends that it was actually the SBA's agent because:

A certified development company's primary responsibility is to the SBA, to ensure that only qualified borrowers submit loan applications, and to ensure that such applicants/borrowers comply with all requirements of the SBA. This responsibility, as noted, also affects the CDC in that the CDC is ultimately obligated to repay the borrowed funds. (Deseret Br. At 28-29)²

The very fact that Deseret and the trial court have different views of Deseret's role is a good indicator that summary judgment was not appropriate. There are simply different ways of reading the evidence on the issue.

As for the merits of Deseret's contention that it was the SBA's agent, it is nothing more than a conclusion stated without supporting facts. If the SBA, a governmental agency, had appointed Deseret its agent, there would surely be some document or utterance by the SBA supporting this, but none is cited. Deseret is therefore claiming it is an agent of the federal government, which means it has the ability to bind and speak for the federal government, without pointing to any legislation or documentation supporting this appointment. This is implausible on its face.

Furthermore, the statement that Deseret's primary responsibility was to the SBA is contradicted –thereby creating a disputed issue of fact – by Deseret's own statements of its role:

² This position represents quite a rather dramatic about-face from Deseret's initial brief in the trial court, in which, as plaintiffs pointed out in their opening brief, Deseret acknowledge that it was plaintiffs' agent for certain period of time. (Rec. 000106)

- Mr. Vanchiere told the plaintiffs “[H]e could really be of assistance to us as an advisor.... (Triesault dep. 83-84)

- Mr. Vanchiere told the plaintiffs “That he would advise us as to the business itself and what he thought of it and what he thought about its viability. He would make suggestions to us. He would guide us along. He would work with our attorney. He would come down and take a look at it and he would follow along the development of the project. And we could call him for advice along the way. He was our mentor.” (Triesault dep. 101)

- Deseret’s web site advertises that “The Deseret Certified Development Company staff members are public sector finance specialists. They work with all types of businesses in assessing financial needs and in selecting the most appropriate public sector finance programs.” (Rec. 000306)

- Deseret’s filings with the Utah Department of Commerce state that is a “seller of investment advice.” (Rec. 000305)

All of this adds up to a factual dispute over who Deseret was acting on behalf of. This is not unlike the common dispute over whether an insurance agent acts as the agent of the insurance company or the policyholder, a dispute that almost always requires a trial. *van der Heyde v. First Colony Life Ins. Co.*, 845 P.2d 275, 280, n.8 (Utah App. 1993).

V.

There Is Ample Evidence Supporting The Claim That Deseret Was Plaintiffs’ Trusted Advisor And Therefore An Implied-In-Law Fiduciary

A fiduciary relationship is created when “one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party.” *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1063 (Utah 1996), *quoting*, *Von Hake v. Thomas*,

705 P.2d 766, 769 (Utah 1985). The ability to exercise influence arises from an inequality between the parties due to factors such as “mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other.” *First Sec. Bank of Utah v. Banberry Development Co.*, 786 P.2d 1326, 1333 (Utah 1990). A fiduciary relationship is necessary in such situation because they cause “the trusting party to relax the care and vigilance he would ordinarily exercise.” *Hal Taylor Assoc. v. Unionamerica, Inc.*, 657 P.2d 743, 748 (Utah 1982).

“Mere friendship or social or religious affiliation between the parties” is not sufficient. *Blodgett v. Martsch*, 590 P.2d 298, 301 (Utah 1978). Beyond that, however, the existence of a fiduciary relationship is a factual question to be determined from all the facts and circumstances of the relationship between the parties. *Id.*

The evidence firmly supports the claim that plaintiffs reposed a high degree of trust and confidence in Deseret in connection with securing the SBA guaranteed financing. Plaintiffs testified that they “placed this matter in Mr. Vanchiere’s hands and followed his instructions as to what steps to take and to follow his advice precisely.” (Rec. 000271, 000272) Plaintiffs trusted Mr. Vanchiere to such a degree that at the closing of the loan, “Mr. Vanchiere presented us with a huge stack of documents and told us that, because we trusted, him we did not need to read any of those documents. We followed Mr. Vanchiere’s instructions and signed the documents without reviewing them.” (Rec. 000268)

Deseret counters by pointing to evidence such as the fact that plaintiffs had their own lawyer, Mr. Newton. There is no need to counter this with a discussion of the extremely limited role played by Mr. Newton, however, because this is a classic example of a disputed

issue of fact. Deseret claims the facts show plaintiffs did not place trust and confidence in them, while plaintiffs present evidence they did. Summary judgment is not possible on this point.

The real crux of the dispute seems to be over whether Deseret was in a superior position to plaintiffs and thereby able to exercise extraordinary influence over them. Deseret points to facts such as plaintiffs' experience in the movie industry, and the presence of an attorney, Mr. Newton, as showing that "there are no facts that would give rise to the implication that plaintiffs were unequal to Deseret." (Deseret Br. At 33)

Deseret's argument, however, ignores the contrary evidence. Plaintiffs testified that prior to this movie theater project they had no prior experience financing a business, and in particular, knew absolutely nothing about the SBA loan process. (Rec. 000272) Deseret, on the other hand, advertised itself as a public financing expert (Rec. 000306), and Mr. Vanchiere assured the plaintiffs that he would "handle the entire SBA loan process." (Rec. 000272) Thus, the evidence shows that, with respect to financing a business, and in particular obtaining SBA-backed financing, Deseret was in a completely superior position to the plaintiffs. In simple terms, plaintiffs knew nothing and Deseret knew everything about this process.

The evidence also shows that, with respect to obtaining the SBA guarantee, Deseret exercised extraordinary influence over Deseret's conduct. Plaintiffs testified that they were dependent on the advice of Deseret and left the matter in Deseret's hands. (Rec. 000271) Thus, for example, Mr. Vanchiere worked through every aspect of the SBA loan application

with plaintiffs, frequently advising them on how to fill it out and what materials to provide.
(Rec. 000271)

Consider also the several letters Deseret wrote to the SBA on plaintiffs' behalf when modifications were needed for the loan. (Rec. 000247, 000245, 000243) In each of those instances, plaintiffs asked Deseret to get the necessary loan modifications, but then left the matter of actually getting the required approval from the SBA completely in Deseret's hands. (Rec. 000267, 000268) Thus, Deseret had "extraordinary influence" over plaintiffs' communications with the SBA, because that matter was left entirely in Deseret's hands.

Although financing was the central area of Deseret's advice, proof that Deseret exercised extraordinary influence is reinforced by the active role Mr. Vanchiere played in other aspects of plaintiffs' business. As detailed in plaintiffs' opening brief, Mr. Vanchiere was looked to for guidance on everything from what movies to run, to whether and when take salaries out of the business. (Br. at 15-16) The reason for this is that plaintiffs had to be sure that their business decisions did not run afoul of any commitments they had made to the SBA. Thus, while Mr. Vanchiere's particular focus was on the SBA financing, the financing issue leaked into virtually every other area of plaintiffs' business. Since plaintiffs were dependent on Mr. Vanchiere to insure that the financing was in order, Mr. Vanchiere's influence seeped into the entire operation. When all the evidence on this claim is taken together, summary judgment was not appropriate.

VI. **Deseret Has Misread The Relevant Policy Concerns**

Deseret argues that it must be free to secure loans for each and every small business that walks in its doors, even when it knows that the assistance it provides one client will

force another outstanding SBA loan into default. A private bank would never engage in conduct as irrational as loaning money to one business when that loan will cause the bankruptcy of one of its other borrowers. That would be a quick route to the bank's own demise. Deseret, however, argues that the policy underlying the SBA requires that the federal government proceed in this completely irrational -- and quite costly -- way. Thus, Deseret contends that SBA can only function properly if loans are blindly given to all who apply, regardless of whether those loans will force prior borrowers into bankruptcy. This misreads the relevant policy concerns on multiple levels, and would probably make quite a few legislators, not to mention taxpayers, rather angry with the SBA.

To begin with, Deseret confuses its role with the role of the overall SBA loan program. Deseret and the SBA loan program are not one and the same. The SBA may choose to guarantee loans to competing business, although, for the reasons stated below, this is not, in fact, the policy of SBA loan program. The issue here is whether Deseret has undertaken the role of an agent and/or fiduciary. Deseret chose to offer itself as a public finance specialist, and Mr. Vanchiere offered himself to plaintiffs as someone who would handle the entire SBA loan process for the plaintiffs. Deseret, therefore, *chose* to operate as an agent and/or fiduciary on behalf of clients such as plaintiffs. Deseret could have operated differently, doing no more than setting up an office where potential borrowers would obtain and fill out SBA loan applications, which Deseret would then transmit to the proper SBA office. Deseret chose, however, to operate by offering to take on clients and handle the SBA loan process for those clients. Having taken on plaintiffs as a client, Deseret

must be held to the same obligations that lawyers, accountants, stock brokers and all other agents and fiduciaries owe to their clients.

On the broader level, as plaintiffs pointed out in their initial brief, the policy of the SBA is to foster competition by enabling small businesses that otherwise would not be able to do so to enter the market. In this regard, the Act provides that the loan program is intended to “aid, counsel, assist, and protect small businesses.” 15 U.S. C. § 631. The policy underlying the SBA does not, therefore, envision indiscriminately launching every small business that applies, but rather launching potentially successful small businesses and “aiding” and “protecting” those businesses it launches. This policy is inconsistent with the notion of loaning money to one small business when that loan will cause the demise of another SBA-supported business.

Deseret tries to ignore this central statement of Congressional purpose by responding (in a footnote) that there is nothing in the SBA loan application that asks about the existence of competing borrowers. (Deseret Br. P. 34, n. 16) Nothing in the SBA’s loan application, however, can refute the official Congressional statement of the policy underlying the SBA loan program.

Deseret also offers a “slippery slope” argument, suggesting that holding certified development companies such as Deseret to a duty of loyalty will make it difficult for them to know who they can and cannot provide assistance to. The duty imposed on Deseret, however, is no different than the duty imposed on lawyers, accountants, stock brokers and all other providers of expert advice. Like all other agents and fiduciaries, Deseret must avoid doing something that it knows will directly damage its existing client. This is surely

not too much to require, and furthermore, it dovetails nicely with the purpose of the SBA loan program, which is to “aid” and “protect” small businesses so that they may compete in the marketplace.

VII. **Deseret Has Misstated The Applicable Standard Of Review**

Deseret creates some confusion on the legal standard applicable to the appeal of the agency and fiduciary issue. In its Statement Of Issues, Deseret states that “the determination of the existence of a fiduciary duty involves a ‘mixed question of law and fact’ and as such, the trial court’s factual findings shall not be set aside on appeal unless clearly erroneous.” (Deseret Br. at 1) Later, Deseret states that whether a fiduciary duty is owed is a “question of law.” (Deseret Br. at 15) Both assertions are incorrect.

The question of whether someone is an agent is a question of fact. Every court plaintiffs have found addressing this question has so held. *E.g., Calhoun v. State Farm Mut. Auto. Ins. Co.*, 96 P.3d 916, 925 (Utah 2004); *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1269 (Utah App. 1998); *Vina v. Jefferson Ins. Co. of New York*, 761 P.2d 581, 584 (Utah App. 1988).

Similarly, the question of whether there is a fiduciary relationship is also a question of fact, to be determined from all the facts and circumstances of the relationship between the parties. Every court plaintiffs have found addressing this question has so held. *First Security Bank of Utah v. Banberry Dev. Co.*, 786 P.2d 1326, 1331 (Utah 1990) (“Whether or not a confidential or fiduciary relationship exists depends on the facts and circumstances of each case”); *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985); *Hal Taylor Assoc. v. Union America, Inc.*, 657 P.2d 743, 748 (Utah 1982); *Blodgett v. Martsch*, 590 P.2d 298, 301 (Utah 1978).

This is not to say that summary judgment cannot be granted on these issues. As with any factual question, if the facts and inferences that can be drawn from those facts are undisputed, the issue question becomes a question of law. *Calhoun v. State Farm Mut. Auto. Ins. Co.*, 96 P.3d 916, 925 (Utah 2004). This means, however, that the question of whether an agency or fiduciary relationship existed is a factual question, unless the facts were undisputed. This also means that the standard of review in this Court, as it would be for any summary judgment ruling, is a review for legal correctness, with no deference to the trial court's ruling. *Smith v. Hales & Warner Const., Inc.*, 107 P.3d 701, 703 (Utah App. 2005).

Deseret's position reflects a misreading of several inapplicable strands of case law. Deseret argues that the existence of a fiduciary relationship is a mixed question of fact and law, and thus subject to a clearly erroneous standard of review, based on *Covey v. Covey*, 80 P.3d 553 (Utah App. 2003). The passage in that decision relied upon by Deseret, however, concerned the appellate standard for a factual finding made after a trial. Furthermore, the cited passage did nothing more than generally sum up all the potentially applicable appellate standards of review: "legal conclusions are reviewed for correctness, factual findings are reversed only if contrary to the clear weight of evidence, and mixed questions of law and fact are reviewed for correctness, but with some deference to the trial court's application of law to a given factual situation." *Id.* at 558. This passage is nothing more than a general summary of the different appellate standards or review. The *Covey* court never held that the question of whether an agency or fiduciary relationship exists is a mixed question of law and fact.

The only other case cited by Deseret, *State v. Irazzary*, 945 P.2d 676, 683 (Utah 1997), held that whether equitable estoppel had been proven at trial was a mixed question of law and fact. There was no breach of fiduciary duty claim involved. No case cited by Deseret, therefore, supports the proposition that the existence of an agency or fiduciary relationship is a mixed question of fact and law subject to a clearly erroneous standard of review.

Deseret then switches gears and argues that the question of whether a duty exists is a question of law for the court to determine. The implication is that you can never subject the question of whether an agency or fiduciary relationship exists to a trial, because that issue presents a question of law, not fact. In reaching this conclusion, Deseret has confused the factual question of whether a certain *relationship* exists, with the legal question of what *duties* are owed. As the cases cited above uniformly hold, whether an agency or fiduciary relationship exists is a question of fact that must be determined based on all the evidence. The issue must be put to a trial unless the facts are undisputed.

Once the factual question of the existence of a relationship has been decided, the court determines the nature of the legal duties that an agent or fiduciary owes. Procedurally, this means that the jury first decides whether Deseret was plaintiffs' agent and/or fiduciary. If the jury finds that it was, the court would instruct the jury as to the legal duties owed by agents/and fiduciaries. The jury would then decide if Deseret had breached those duties.

Deseret's cases do not suggest otherwise. They all involve negligence actions where the facts are not disputed, and thus the court must decide if a duty exists as a matter of law. Thus, for example, in *Weber v. Springville City*, 725 P.2d 1360 (Utah 1986), the question was whether a town that maintained a dam was liable to someone who drowned in the river that

flowed from the dam. The court held that the question of whether the town had a duty under those facts was a question of law. The basic facts of the accident were not disputed, and the court had to rule on the legal question of whether a duty was owed. That decision, therefore, does not undermine the notion that the existence of an agency or fiduciary relationship is a question of fact, which can only be decided by the court on summary judgment if the facts are undisputed.

VIII.

Plaintiffs' Evidence Creates A Disputed Issue Of Fact On Causation

The issue of proximate cause is a question of fact for the jury to determine in all but the clearest cases. *Nelson ex rel. Stuckman v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996). Deseret's burden is particularly heavy because Deseret has not attempted to affirmatively prove why plaintiffs' theater failed. Rather, Deseret argues that plaintiffs lack any evidence of causation. This kind of summary judgment motion can be granted only where "there is no evidence to establish a causal connection, thus leaving causation to jury speculation." *Clark v. Farmers Ins. Exchange*, 893 P.2d 598, 601 (Utah App. 1995).

In their opening brief, plaintiffs cited evidence that their theater was profitable before the competing theater opened, and that every economic measure of how the business was doing dropped drastically immediately following the opening of the competing theater. Deseret's position is that this temporal link provides nothing more than speculation on the issue of causation. If one compares this evidence to cases cited by Deseret in which the court found evidence of proximate causation lacking, the lack of merit in this argument becomes clear.

In *Clark v. Farmers Ins. Exchange*, 893 P.2d 598, 601 (Utah App. 1995), for example, the plaintiff was injured in a complex, multi-vehicle crash. The plaintiff had no recollection of how he had been injured, no witnesses saw how he was injured, and plaintiff's experts could not reconstruct how the plaintiff was injured. There was, therefore, a **total** lack of evidence showing that defendants caused of plaintiff's injuries.

Similarly, in *Stabeli v. Farmers' Co-op. of Southern Utah*, 655 P.2d 680 (Utah 1982), a fire destroyed some of the plaintiff's grain while the defendant was storing it. The plaintiff had no evidence as to the cause of the fire, which could have been caused by defendant's negligence, but which could also have been the result of non-negligent factors. In the absence of **any** evidence of causation, summary judgment was entered in favor of the defendant.

What these cases share is a complete lack of evidence showing what the cause of the plaintiff's injury was. In contrast, plaintiffs here have provided specific proof that their business was succeeding, and then went into a downward spiral immediately upon the opening of the competing theater. The evidence also shows that the competing theater's business plan predicted that it would put the plaintiffs' theater out of business. This evidence is not speculative. A comparison of the financial indices of the business before and after the opening of the competing theater is not only concrete evidence of causation, it is the most logical and direct evidence of the effect of the opening of the competing theater. Deseret suggests that many other factors could have caused plaintiffs' business to fail, but these arguments go to the weight of plaintiffs' evidence; they do not establish the complete absence of admissible evidence that a summary judgment requires.

Deseret also argues that there is no proof that its conduct caused the competitor's theater to open. In so arguing, Deseret ignores two undisputed facts: (1) that the SBA can only accept a loan if all other financing is unavailable (13 C.F.R. § 120.101), and (2) that the only way to get an SBA-backed loan in Utah at that time was to hire Deseret. (Rec. 000459) Since the SBA accepted the competing theater's SBA loan, that necessarily means the competing theater could not have obtained any other financing. Furthermore, the competing theater could not have obtained the SBA-backed loan without Deseret's assistance because Deseret was the only SBA game in town at that time. Without Deseret, therefore, the competing theater would not have gotten any financing and would therefore never have opened its doors. Consequently, the evidence strongly supports plaintiffs' claim that Deseret's conduct caused the competing theater to open, and the subsequent demise of plaintiffs' theater.

Deseret's final argument is that the causation in this case requires expert testimony as a matter of law. As plaintiffs pointed out in their opening brief, there is no rule of evidence that requires the use of expert testimony. Rule 702 provides the requirements for when expert testimony can be admissible, but it does not require its use in any kind of case.

The argument that plaintiffs were required to use expert testimony is based on a series of malpractice cases that presented an issue concerning the standard of conduct for a professional in a technical field such as medicine, architecture or engineering. The courts held that, in some instances, juries could not be expected to know what a reasonable standard of conduct for someone in those professions would be, and thus expert testimony was required. *See, e.g., Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 574 (Utah App. 1994).

This limited doctrine has never been extended outside the realm of the standard of care for someone in a technical profession. It has never been applied to anything remotely like the case at bar, nor should it be. While operating a theater is no doubt a complex undertaking, there is nothing mysterious about what makes a movie theater successful. A theater must sell a sufficient number of tickets. The only two sources of a movie theater's income are ticket sales and concession stand sales. Both are dependent on the number of customers attending the theater. If the number of patrons is sufficiently high, and revenue exceeds expenses, the theater will make money, and if not, it will fail.

The jury will be presented evidence that the two theaters shared the same market, and anyone with a basic knowledge of geography can judge whether that is correct. Furthermore, the jury will be presented with evidence that shortly after the competing theater opened, ticket sales and consequently income at plaintiffs' theater dropped precipitously and never recovered. There is no reason why a jury would be incapable of judging whether this evidence persuasively links the opening of the competing theater to the failure of plaintiffs' theater. The jury can understand what ticket sales mean, and can understand the effect that a drop in customers had on plaintiffs' theater. Deseret can present its own evidence of other alleged causes of the demise of plaintiffs' theater, and the jury can choose what it finds more credible. There is no legal basis for ruling that this factual question is so beyond the ken of the average juror that expert testimony is required as a matter of law.

IX.
The Evidence Supports The Intentional Interference
With Prospective Economic Advantage Claim

The sole issue on this claim is whether plaintiffs have any evidence that Deseret used “improper means.” Deseret does not deny that improper means can consist either of evidence that Deseret used deception, or that Deseret violated an industry ethical standard. The summary judgment can be sustained only if plaintiffs lack any admissible evidence of either form of “improper means.”

With respect to deception, the evidence shows that Deseret provided the SBA an appraisal in connection with the loan application for the competing theater. That appraisal points out that the new movie theater would likely put an existing theater out of business, but without disclosing that the existing theater was another SBA borrower. Deseret argues that this does not constitute evidence that the SBA was deceived because “Plaintiffs presented no testimony from an appropriate SBA representative stating that they did not know about the competing nature of the loans.” (Deseret Br. at 47) While evidence from an SBA official might be relevant (and it is most curious that Deseret has not presented such testimony itself), this does not demonstrate that plaintiffs have offered no evidence on this point. Testimony by the SBA is not the *only* relevant evidence. Plaintiffs have shown that the SBA was provided a deceptive document. That, alone, permits a finding of deception, which precludes summary judgment.

Deseret’s argument with respect to the violation of an ethical standard is equally unavailing. It is undisputed that: (1) the SBA precluded Deseret from having a “conflict of interest” with respect to the plaintiffs (13 C.F.R. § 120.140(b)), and (2) this regulation

provides the applicable ethical standard for Deseret. Thus, if Deseret's conduct with respect to the second theater is considered a "conflict of interest," it is undisputed that plaintiffs' evidence satisfies the "improper means" test for the tortious interference claim.

Deseret has no direct argument that its actions in aiding the competing theater did not constitute a conflict of interest. Rather, reasoning backward from the desired result, Deseret argues that because it owed no common law duty, and because public policy problems would purportedly arise from a ruling that limited its dealings with competing businesses, its conduct cannot be deemed a conflict of interest. This argument suffers multiple flaws.

First, even if one assumes that the trial court was correct in ruling that Deseret owed no common law fiduciary duty to plaintiffs, that ruling would have no effect on the SBA's regulation that Deseret cannot have a conflict of interest. The regulation is not an attempt to codify common law duties, but rather a regulatory statement of what is and is not ethical conduct for someone in Deseret's position. If the SBA thought that certified development companies needed no ethical restrictions beyond what the common law provides, there would have been no need for the regulation.

With respect to the public policy considerations, Deseret is arguing that, due to public policy considerations, the SBA's "conflict of interest" regulation cannot be taken literally. In effect, Deseret is arguing that the SBA issued a regulation that is inconsistent with the policies under the SBA. To state this argument is to refute it.


Once those arguments are stripped away, there is nothing left to support the trial court's ruling that there was no conflict of interest as a matter of law. The summary

judgment can be sustained only if plaintiffs lack any evidence of a conflict of interest. The activities of Deseret probably constitute a conflict of interest as a matter of law. To provide crucial assistance to a competitor would seem to be an unavoidable conflict of interest. For the purposes of this appeal, however, it is sufficient to show only that this constitutes at least some evidence from which a fact finder could conclude that Deseret had a conflict of interest.

CONCLUSION

For the reasons stated in this and plaintiffs' opening brief, plaintiffs-appellants respectfully request that the Court reverse the entry of summary judgment in favor of the defendant on the Count I breach of fiduciary duty claim, the Count II intentional interference with prospective economic relations claim, and the intentional infliction of emotional distress claim, and remand the case for trial on those claims.

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CERTIFICATE OF SERVICE

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