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IN THE UTAH COURT OF APPEALS

HASSAN MARDANLOU, Plaintiff/Appellee/Cross-Appellant, vs. ALI GHAFFARIAN, individually; NASRIN FAEZI-GHAFFARIAN; ALI GHAFFARIAN and NASRIN FAEZI-GHAFFARIAN, dba ACCESS AUTO, Defendants/Appellants/Cross-Appellees.	Case No. 20040897 - CA District Court No. 980911308

SECOND BRIEF OF DEFENDANTS / APPELLANTS

On Appeal from the Final Amended
Judgment of the Third District Court
The Honorable L.A. Dever

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ARGUMENT

I. PLAINTIFF'S ORAL PARTNERSHIP CLAIM IS BARRED BY THE APPLICABLE FOUR YEAR STATUTE OF LIMITATIONS.

A. The Seven Year Statute of Limitations in Section 78-12-6 is Not Applicable.

In an attempt to defeat the otherwise clear application of the four year statute of limitations to his oral partnership claim, Mardanlou first argues, without any supporting authority, that his claim is instead governed by the seven year statute of limitations applicable to actions "founded upon the title to real property," Utah Code Ann. § 78-12-6. (Appellee's Brief at 24-25). His argument is without merit. A plain reading of the Complaint and Mardanlou's entire legal theory heretofore has been that his claim is for breach of an alleged oral partnership agreement. Only now in attempt to save his stale claim, which should have been dismissed by the court below pursuant to the applicable four year statute of limitations, does Mardanlou attempt to construe his claim as being one "founded upon the title to real property."

Mardanlou's Complaint asserted three causes of action: (1) "Breach of Partnership and/or Joint Venture Agreement"; (2) "Fraud"; and (3) "Negligent and/or Intentional Misrepresentation". (R-1). At issue in this appeal is only the first cause of action, for breach of the alleged oral partnership agreement between the parties. Mardanlou's "remaining claims in this action [were] dismissed with prejudice." (Amended Judgment, R-1223).

It is undisputed that no *written* partnership agreement was entered into between the parties. Mardanlou's action is instead based on his allegations that defendant Ali Ghaffarian orally told plaintiff and others that they were "partners" in Access Auto. Mardanlou alleges in his first and only cause of action at issue that "Defendant breached the partnership and/or joint venture agreement by not sharing the profits of Access Auto equally with Plaintiff." (R-1 at ¶ 13.) See also Plaintiff's Trial Brief: "A partnership was formed between Hassan and Ali in November 1991 when they made an *oral* agreement and sealed it with a handshake." (R-597) (emphasis added); see also R-1290 at p. 55:7-11). Under Utah law, claims for breach of an agreement "not founded upon an instrument in writing," *i.e.* oral contract claims, are subject to a four year statute of limitations. Utah Code Ann. § 78-12-25(1).

The 1991 Lease referenced in the Complaint (and copied at Exhibit 1 thereto) was between Cline Dahle Investment as the lessor and Mardanlou's company M&M Motors and defendants' company Access Auto as the two lessees or co-tenants. (R-1). Mardanlou's Complaint does not assert that this Lease was breached, nor is it the gravamen of his case against the defendants. Rather, the Lease is cited as evidence by Mardanlou in support of his claim that he had an oral partnership agreement with Ghaffarian and Access Auto. (Actually, the fact that the Lease names both Access Auto and Plaintiff's company M&M Motors as the lessees indicates that the parties did not intend to be partners, but that they intended instead to operate separate businesses from

that same location. (See Appellants' [first] Brief at pp. 25-26).

Early on the Utah Supreme Court rejected a similar attempt by a plaintiff to mischaracterize his claim as being "founded upon the title to real property" in an attempt to take advantage of the longer statute of limitations now found in Section 78-12-6. In Davidsen v. Salt Lake City, 81 P.2d 374 (Utah 1938), the plaintiff's sought to cancel on grounds of fraud or mistake, a real estate deed that plaintiff had given to defendant. The court ruled that although real property was at issue in the case, the plaintiff's claim was barred by the three-year statute of limitations for fraud, rejecting plaintiff's contention that the seven year limitation period of the predecessor to Section 78-12-6 controlled. The court reasoned that because the plaintiff was "not in possession of the land" and was asking "for affirmative relief other than removal of a cloud on his title," the essence of his claim was for fraud, and he was not entitled to the seven year limitations period applicable to real estate actions. Id. at 376. Similarly, the affirmative and type of relief sought by Mardanlou's first cause of action manifests that his claim is subject to the four year oral contract limitations period, and not the longer limitations period in 78-12-6. In this case Mardanlou did not seek title or even possession of the property, he wanted money damages. (See R-1).

The District Court's decision to award Mardanlou an interest in Access Auto's real property was a *remedy*, in lieu of monetary damages, which arose from or was founded upon Mardanlou's *claim* that he had an oral partnership agreement with the Defendants

that was breached (and also upon his claim of fraud, which was dismissed). See Davidsen, 81 P.2d at 376-77:

> [Plaintiff] may, in one action, it is true, ask for cancellation of the deed and to have his title quieted and recover possession of the real estate. But if his relief in each case depends as here upon the cancellation of a deed for fraud or mistake, he must bring his action within the period provided by law for an action based upon that ground. It would be extremely mischievous if a person claiming to be a victim of fraud or mistake were permitted to delay bringing his action until nearly seven years after discovery of the fraud or mistake upon which he relies.

The four year statute of limitations for a claim of breach of an oral agreement is what clearly applies here, 78-12-25(1), not the seven year statue of limitations in 78-12-6.

B. Plaintiff's Claim Accrued No Later than November 1993, and the Discovery Tolling Rule is Inapplicable.

Mardanlou next argues that even if the four year statute of limitations applies, his claim did not accrue until the day he quit working for Access Auto "on November 4, 1997 when he *discovered* for the first time that Ali [Ghaffarian] did not consider him a partner." (Appellee's Brief at 25, italics added). However, Mardanlou's own testimony at trial established numerous times that "the last event necessary to complete the cause of action" occurred no later than November 1993, five years before Mardanlou filed his Complaint, which events Mardanlou was well aware.[1] The discovery rule has no

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[1] See Appellants' [first] Brief at pp. 10-13, and 33-35, itemizing Mardanlou's testimony that he was denied partnership rights of an equal share of the profits and of mutual right of control from the beginning of his relationship with defendants. Mardanlou was always just paid a salary set by Ghaffarian (except for a $10,000 bonus in March 1993) and he never participated in deciding Ghaffarian's pay; he was not given access to the company's books, bank statements, or even to its mail box; he was never

application to situations such as in the instance case where the plaintiff knew or should of known of the facts that would provide the basis for a claim of breach of contract, and regardless, there was no evidence of any affirmative concealment by Defendants of those facts.

The discovery rule is a narrow equitable exception to the "general rule that 'a statute of limitations begins to run 'upon the happening of the last event necessary to complete the cause of action'." Russell Packard Development, Inc. v. Carson, 108 P.3d 741, 746 (Utah 2005)(quoting Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981). The discovery rule has no application to situations (like in the instance case) where the plaintiff possessed actual or constructive knowledge of the events forming the basis of his or her cause of action at the time those events occurred. See Snow v. Rudd, 998 P.2d 262 (Utah 2000) (constructive trust claim barred by statute of limitations and not tolled by the discovery rule as a matter of law where plaintiff had adequate notice to inquire into actionable facts more than four years prior to filing claim); Atwood v. Sturm, Ruger & Co., 823 P.2d 1064 (Utah 1992) (discovery rule inapplicable where plaintiff knew of his injuries four years before filing claim for negligence). "Mere ignorance of the existence

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provided partnership tax information (1991-97); and he was not involved in renewing the Lease in November 1992 nor in Ghaffarian's purchase of that property in November 1993. Moreover, this establishes that there were ample facts in the trial record to establish and preserve Defendants' affirmative defense of statute of limitations. (Responding to Appellee's Brief at 28). See also R-1291:18-21, where Defendants' trial counsel explains to the trial court that his questions about Plaintiff's tax returns "goes to when a possible cause of action would have accrued."

of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period." Russell Packard, 108 P.3d at 746. Like the plaintiff in Snow v. Rudd, "[t]his is a clear case of a plaintiff simply sitting on [his] rights."[2] 998 P.2d at 267.

The discovery rule exception to the statute of limitations is applied "when a defendant has affirmatively concealed a plaintiff's cause of action," id. at 266; see also Russell Packard, 108 P.3d at 746-51. Plaintiff's argument contending that defendant Ghaffarian engaged in affirmative concealment in this regard is without merit. No evidence of any such affirmative concealment was introduced by the Plaintiff at trial, and the District Court made no such finding.

Affirmative concealment is inherently inapplicable to situations, as in the instance case, where the plaintiff knew of the facts that provide the basis for a claim at the time those facts occurred. Mardanlou knew that he was being denied an equal share of the

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[2] Mardanlou claims that the "[t]he trial court specifically found that the Plaintiff had not been 'sleeping on his rights'. (R-1293 at p. 131:22-24)." (Appellee Brief at 28). That statement by the trial court was *not* in the context of whether the discovery rule applied to the statute of limitations for breach of an oral agreement, but was in response to Defendants' post-trial argument (Feb. 25, 2004) that Plaintiff had waived any claim to rent on his court-determined one-half interest in the property since November 1997 because Plaintiff had not asserted any possessory interest in the property since then. In response to that argument, the District Court said: "There's a lawsuit on this thing since 1998, Mr. Gilson. I don't think he's been sleeping on his rights." (R-1293 at p. 131:22-24)." Plaintiff's argument that this statement was a specific finding by the trier of fact on whether Plaintiff was justified in delaying until 1998 to file his contract claim is simply false and misleading.

profits and of mutual right of control from the beginning of his relationship with Defendants, as he testified at trial. See footnote 1, supra. Also, Mardanlou had actual or at minimum constructive knowledge that Ghaffarian had exercised the purchase option in the Lease without him by November 1993 when that option expired. Mardanlou signed that Lease as a joint tenant with Access Auto. Mardanlou is charged with knowledge of the terms of the Lease, including its purchase option. A person cannot conceal a fact from someone who is already aware of that fact. Thus, Mardanlou cannot logically contend that Ghaffarian engaged in "concealment and misleading conduct in the execution of the purchase option" (Appellee's Brief at 26).

Morever, the contention that Ghaffarian continually told Mardanlou in response to his questions that "he was a partner" hardly constitutes a "prima facie showing of fraudulent concealment." Russell Packard, 108 P.3d at 750. In fact, under Mardanlou's theory of the case, a statement by Ghaffarian that Mardanlou was his partner would be a truthful admission, not a fraudulent concealment of fact. In addition, Mardanlou admitted that he learned in 1993 that Nasrin Ghaffarian was a partner or owner of Access Auto. (R-1290 at pp. 79:8-80:24).

There is no evidence that Ghaffarian affirmatively did anything to conceal the facts that he was not treating Mardanlou as his partner in the business. Ghaffarian's alleged statements that Mardanlou "was a partner" is tantamount to a party saying "we have a contract," but nevertheless continues to breach that contract. Given Mardanlou's position

that he always believed that Ghaffarian was his partner, then he has no excuse for waiting more than four years from when Ghaffarian failed to treat Mardanlou as his partner to bring his claim for breach of their alleged oral partnership agreement. Mardanlou knew that Ghaffarian was in breach of their alleged partnership from the beginning of their relationship when he unilaterally controlled all the key decisions about the "partnership" assets, including the real property and their respective pay, and by never accounting for or sharing profits with Mardanlou.[3]

Lastly, Plaintiff contends in the context of his discovery tolling argument that "the trial court found that Mr. Ghaffarian committed fraud in his representations to Mr. Mardanlou. (R-1292 at pp. 518:25-519:2)" (Appellee Brief p. 27). Plaintiff again is mischaracterizing the record and referring to statements made in a completely different context. The trial court did not make any finding that Defendants committed fraud or engaged in concealment as to any facts that would toll the running of the statute of limitations.[4] The "fraud" statement by the trial court was in response to Defendants' closing argument at trial that Plaintiff's partnership claim failed under Utah Code § 48-1-15(7) because he never got consent from Nasrin Faezi-Ghaffarian, whom defendants

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[3] Plaintiff's Complaint acknowledges that this is the act of breach: "Defendant breached the partnership and/or joint venture agreement by not sharing the profits of Access Auto equally with Plaintiff." (R-3 at ¶ 13).

[4] Actually, the trial court dismissed with prejudice plaintiff's second cause of action for fraud (R-1223), which was an alternative claim alleging that defendant fraudulently represented to plaintiff that they were partners (R-3).

contend is a co-owner in Access Auto. (R-506:23-508:11). In response, this is what the trial court said:

> The defense next argues that there must be an agreement of all partners in order to admit new partners. The argument is that plaintiff's--I mean, the defendant's wife had not agreed to this. The problem with this argument is that Mr. Ghaffarian represented that he was Access Auto. He signed documents as a dba of Access Auto. The tax returns filed by him list him as the sole proprietor of Access Auto. The Court, therefore, rules that he is estopped from now claiming that there were additional partners.[5] Even if his wife was a partner, he has committed fraud by representing to Mr. Mardanlou that there were no others.[6]

(R-1292 at pp. 518:25-519:2, which is the same record citation as Appellee's Brief at 27).

As set forth above, Plaintiff's claim for breach of an alleged oral partnership agreement is barred by the four year statute of limitations, which accrued no later than November 1993. Plaintiff's claim, filed in November 1998, is time barred and the discovery tolling rule does not apply because there was no affirmative concealment by the defendants of the alleged facts that provide the elements for Plaintiff's breach of partnership claim.

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[5] Mardanlou admitted that he learned in 1993 that Nasrin Ghaffarian was an owner or partner, (R-1290 at 79:8-80:24).

[6] The trial court never addressed why Mardanlou's tax returns for the years 1991-97, where he consistently reported his income from Access Auto as employee wages rather than as partnership proceeds, including the $10,000 bonus in 1993 (Plaintiff Trial Exh. 6; R-1291 at pp. 235:17-236:1, 237:24-238:5; R-502:24-505:5), did not similarly estop Mardanlou from claiming in this case that such income was partnership income.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT PLAINTIFF WAS A PARTNER IN ACCESS AUTO.

A. Defendants Satisfied the Marshaling Requirement.

Plaintiff's argument that Defendants' brief did not comply with the marshaling requirement is without merit. Defendants more than amply complied with the marshaling requirement . See Appellants' Brief at pp. 5-14, 19-22. Moreover, as itemized below, the evidence that Plaintiff identifies as having been omitted (Appellee Brief at pp. 18-19) was not omitted in the Defendants' initial brief, is not relevant, is insignificant, or has been mischaracterized, or is evidence that actually supports the Defendants' position that there was no partnership agreement. Defendants respond as follows, *seriatim*, to Plaintiff's list of 10 allegedly omitted evidentiary facts:

1. Defendants noted in their initial brief (at p.21) that joint business cards were purchased. The fact that Mardanlou's checking account for his company "M&M Motors" was used to pay for those cards in March of 1991 is not relevant or significant. Defendants do not dispute that in 1992 that the parties had a cost sharing arrangement to operate their separate businesses, but never a profit sharing agreement, which is what is necessary for a partnership. (Appellants' Brief at p. 25, 28; R-1291 at pp. 451:16 - 452:10).

2. The fact that Mardanlou never obtained a business card using the name M&M Motors is consistent with Defendants' position that he gave up that business and became an employee of Access Auto in the latter part of 1992 or early 1993. (Appellants'

Brief at p. 9-12, 15; R-1291 at pp. 451:16 - 454:6).

3. The fact that Mardanlou maintained a separate bank account for M&M Motors until the end of 1992 again is consistent with Defendants' position that during that time the parties had a cost (not profit) sharing arrangement, and that after that time Mardanlou became a mere employee of Access Auto. (Id.) Mardanlou was not an authorized signer on Access Auto's bank account and never had access to its check ledger or statements. (R-1290 at pp. 107:18-108:11; R-1291 at p. 435:7-15).

4. As was made clear by the insurance policy itself and by the testimony of Mardanlou and the insurance agent, there was only one insurance policy with both parties' names, not two policies, a fact which was also noted in Defendants' initial brief (at p.21). (R-1290 at pp. 40:10-41:6, 195:8 - 201:9; Plaintiff's Trial Exh. 4).

5. The few cars that Mardanlou claimed to have purchased for Access Auto after 1992 were with the use of Ghaffarian's name and with the Ghaffarians' money. Before then he went to the car auctions under the name M&M Motors. (R-1290 at pp. 76:6-79:14). Mardanlou could not buy cars in his own name after 1992 because he was not licensed. (R-1290 at p. 76:10-24).

6. Mardanlou was paid a salary and not a commission because he was a manager for Access Auto; he was not regular salesman. (R-1290 at pp. 38:17-25, 51:12-18; 256:16-257:20). The fact that Mardanlou was a salaried manager for Access Auto was also noted in Defendants' initial brief (at p.15, 22).

7. Mardanlou did not testify that Ali Ghaffarian told him that "they two were the only members of Access Auto." His actual cited testimony was that in late 1994 or early 1995: "We talked about, you know, that we started this business together and that we're going to be - - we are partner in this and there's nobody going to come between us." (R-1290 at pp. 64:4-5, 65:1-3). During cross-examination, Mardanlou acknowledged that he had learned in 1993 that Nasrin Ghaffarian was a partner or owner of Access Auto when he looked at the business license, stating: "That's the time I found out that Nasrin was the owner." (R-1290 at p. 80:4-24).

8. Mardanlou claims that the alleged partnership was formed the same day that Ali Ghaffarian signed the Lease for Access Auto and that Mardanlou signed for M&M Motors. (Complaint ¶ 6, R-2; Plaintiff's Trial Exh. 1; R-1290 at p.54:4-10). If a partnership truly existed at that time, then the Lease would not have needed to have both parties listed as lessees, but would have only had one entity, Access Auto, as the lessee.

9. Plaintiff's statement and citation to R-933 about the mortgage being paid from the business is the District Court's finding, and not an item of evidence in support of such finding. In fact, the evidence was undisputed that Ali Ghaffarian, and not Mardanlou, "put up the money for the financing for the cars" (R-1290 at pp. 39:1-3, 79:3-4, 83:6-9), that Ghaffarian paid all the rent and mortgage payments on the property (R-878; R-1293 at pp. 25:19-26:13, 37:8-23), and that Mardanlou did not have signing authority on Access Auto's bank account, nor access to its statements (R-1290 at pp.

71:17-22, 107:18-108:11; R-1291 at p. 435:7-15).

10. The fact that Mardanlou's spouse was temporarily allowed to use an Access Auto car is insignificant. Also, there was no evidence that Defendants did not allow other employees or their spouses temporary use of company vehicles as Plaintiff suggests.

B. Where No Legally Sufficient Evidence of Profit Sharing or Mutual Control Was Introduced By Plaintiff, the District Court's Conclusion that a Partnership Existed Should Be Reversed.

Defendants do not dispute that the parties engaged in some cost and skill sharing during the 1991-92 time period. (See Defendants' initial brief at 14). The issue, however, is whether there was legally sufficient evidence as to the other essential elements to find that a partnership existed, named mutual right to control the business and profit sharing. Recognizing the weakness of the evidence on these elements, Plaintiff contends that those elements are "not 'essential,'" citing Bassett v. Baker, 530 P.2d 1, 2 (Utah 1974). (Appellee Brief at 22). A plain reading of Bassett, and it holding, make clear that mutual right to control the business, and sharing of profits, are indeed essential elements for a partnership to exist. In Bassett, the Utah Supreme Court reversed the trial court's finding that a joint venture existed due to the fact that there was no agreement by the parties to share in any profits of the venture. See also Bates v. Simpson, 239 P.2d 749 (Utah 1952), Betenson v. Call Auto and Equipment Sales, 645 P.2d 684 (Utah 1982), and Harmon v. Greenwood, 596 P.2d 636 (Utah 1979), which were auto dealer cases that were discussed in Defendants' initial brief at pp. 28-31, wherein the Utah Supreme Court

again rejected claims of joint venture or partnership due to lack of mutual control and no express or implied agreement to share profits. These cases were not addressed by Plaintiff.

1. Lack of any Profit Sharing Agreement.

Mardanlou points to just two "facts" to support his argument that there was an agreement to share profits. First, he contends that he received "$10,000 as his share of profits in March of 1993," citing "R-1291 at p. 48:7-20"). (Appellee Brief p. 23). This is legally insufficient. This was a one time payment, in which Plaintiff had listed as a salary bonus on his tax return. (R-1290 at 97:2-98:3; Plaintiff's Trial Exh. 6). In fact, Mardanlou never once reflected a partnership "share or return for Access Auto" on his individual tax returns for the years 1992 through 1997. (R-1291 at pp. 237:19-238:1; Plaintiff's Trial Exh. 6). Also, Mardanlou cannot explain the fact that no such "profit" payments were made during the five other years that he contends the partnership existed, or why he never obtained any accounting to ascertain that this even $10,000 amount was his 50/50 profit share, or why he did not have signing authority on Access's bank accounts, or access to its financial statements.

Mardanlou's second and only other piece of evidence that he cites to in support of an alleged agreement to share profits is that he "was never paid a commission as was the case for the regular salesman who did not have a partnership interest in the business." Mardanlou was paid a salary and not a commission because by his own admission he was

a manager for Access Auto, not a regular salesman. (R-1290 at pp. 38:17-25, 51:12-18; 256:16-257:20). Mardanlou's commission versus salary distinction is irrelevant; it is a distinction based on the different work performed by sales employees and non-sales employees, not due to whether they had an ownership interest in the company. Moreover, the fact that Mardanlou was paid a flat salary actually supports the conclusion that he was merely an employee. A partner's income is not set, but fluctuates depending upon the profitability of the business.

Given all the many other significant facts in the record demonstrating Plaintiff's lack of any agreement to share profits, the District Court erred in finding that Plaintiff had a partnership agreement with Defendants. (See supra Note 1 and Appellants' Brief at pp. 5-14, 22-31).

2. Lack of Right to Mutual Control.

Plaintiff points to some facts indicating that he "exercised some authority over the business in several aspects," but he does not contend, (no could he given the lack of evidence) that he had a mutual right to control the business along with Ghaffarian. It is undisputed that Ghaffarian alone set his and Mardanlou's pay, that Ghaffarian controlled all the finances, prepared the tax returns, and decided to renew the property lease and to exercise the purchase option.

The fact cited that Mardanlou was a co-tenant under the 1991 property Lease does not indicate mutual right control to the operation of Access Auto. The listing of

Plaintiff's company, M&M Motors, and Ghaffarian's company, Access Auto, as co-tenants under the Lease actually indicates that there was an agreement to operate *separate* businesses from the same location, not that there was an agreement to operate one business on that property, in which profits and control would be shared.

Mardanlou's other cited facts are also not significant and do not demonstrate mutual control. The evidence that Mardanlou purchased a few cars for Access Auto after 1992 is insignificant. Mardanlou acknowledged that Ghaffarian was primarily responsible for purchasing the cars, and that cars were always purchased with the use of the name of Ali Ghaffarian and with the Ghaffarians' money. (R-1290 at pp. 38;10-39:23, 76:6-79:14). Also, Mardanlou was amply reimbursed for the few times that he wrote checks in 1992 from his M&M Motors account to pay employees and for other expenses. (Defendants' Trial Exh. 1; R-1290 at pp. 35, 87-88, 153-156). Finally, the insurance policy showed the name of both Access Auto and M&M Motors in order to save costs by having one policy instead of two, as the insurance agent testified. (R-1290 at pp. 195:8 - 201:9). Regardless, the insurance policy is not evidence of mutual control, but rather supports Defendants' position that the parties were operating two businesses from that location at that time.

Given all the many other significant facts in the record demonstrating Plaintiff's lack of mutual control over the business of Access Auto, the District Court erred in finding that Plaintiff had a partnership agreement with Defendants. (See supra Note 1

and Appellants' Brief at pp. 5-14, 22-31).

III. PLAINTIFF SHOULD NOT HAVE BEEN AWARDED RENTAL DAMAGES OR INTEREST THEREON.

Plaintiff's opposition brief failed to dispute Defendants' arguments in their initial brief (at pp. 36-37) that under the statute relied upon by the District Court, Utah Code Ann. § 48-1-39, that Plaintiff could choose to have his partnership interest plus half of (1) the "interest" on the value of the dissolved partnership *or* (2) "the profits attributable to the use of his right in the property of the dissolved partnership," but not both. It is undisputed that the District Court did not award damages on the value of the partnership, because it instead ordered the Defendants to transfer by deed to Plaintiff a one-half interest in the property. (R-1221-23). Also, Plaintiff did not introduce any evidence of any "profits" attributable to the Defendants use of the property after Mardanlou quit working for Access Auto in November 1997.

The first time that Plaintiff argued that he was entitled to one-half of the rental value of the property after he quit the alleged partnership in November 1997 was not at the time of trial, but was at the April 3, 2003 post-trial evidentiary hearing to determine offsets to the one-half interest in the property that the District Court had awarded Plaintiff. Also, Plaintiff did not introduce any evidence on that point at the April 3, 2003 hearing. (R-1293 at pp. 15-111). Instead, Plaintiff asked the District Court to rely upon rent comparables within Plaintiff's appraisal of the value of the property that was introduced during the October 2002 trial (R-1293 at p.20:17-22; Plaintiff's Trial Exh. 8),

which appraisal the court had indicated, at the start of the April 2003 hearing, was "immaterial, because I didn't award him half of the appraised value; I awarded him half the property..." (R-1293 at p. 21, 23:2-3).

The District Court construed Plaintiff's rental value argument as his election to receive "profits" instead of "interest" under Section 48-1-39, and also awarded "interest" on top of the rent amount. (July 22, 2003 Memorandum Decision and Order at p. 7, R-1094; R-1081 at ¶ 5; R-1222). No explanation was given as to how "rental value" is tantamount to "profit" for the use of the property. Also, neither the Plaintiff nor the District Court ever explained how such an appraisal could be used when it was for a different time period, 1997, instead of the post-dissolution period 1997-2003, or how that appraisal could be relied upon for the many reasons explained by the Defendants' rental value expert, which reasons were never refuted by the Plaintiff nor addressed by the District Court in its rulings. (R-813-814; R-1293 at pp. 100-110; Defendants' Exh. 7 at April 3, 2003 evidentiary hearing).

Where the Plaintiff was awarded a one-half interest in the property, rather than the value of the property at the time of dissolution, Section 48-1-39 should not have been applied. Given the nature of the Amended Judgment, Plaintiff has in effect already been given "interest" on his share in the partnership by virtue of the fact that he will get the benefit of any appreciation in the property between the time the time that such interest was awarded to him and when it may be sold or partitioned.

In similar cases involving persons who have an equal interest in real property, courts have refused to award rental value to the excluded partner or co-tenant where such partner, such a Mardanlou in the instant case, has failed to assert the right to use the property after they separated. See Roberts v. Roberts, 584 P.2d 378, 380 (Utah 1978) ("The law is clear in Utah that one cotenant in possession is not liable to his cotenant for the fair rental value of the occupied property, except where he ousted the cotenant from possession, or uses the property so as to necessarily exclude the cotenant."); Fritch v. Fritch, 335 P.2d 43 (Wash. 1959) (plaintiff not entitled to rental on property occupied exclusively by ex-spouse defendant following their divorce where plaintiff never sought use of that property); cf. Gillmor v. Gillmor, 694 P.2d 1037, 1040-41 (Utah 1984) ("We hold that when a cotenant out of possession makes a clear, unequivocal demand to use land that is in the exclusive possession of another cotenant, and that cotenant refuses to accommodate the other tenant's right to use the land, the tenant out of possession has established a claim for relief.") Mardanlou was not excluded or ousted from Access Auto, he "just left." (R1290 at p.66:5). Since the time he quit Access Auto in 1997 he has not sought to use that property, nor did he ever make "a clear, unequivocal demand to use land that is in the exclusive possession of" the Defendants. Gilmore, 694 P.2d at 1040-41. Plaintiff's Complaint, filed a year later, also did not seek possession of or title to the property. Given these undisputed facts, the District Court erred in awarding Plaintiff rent from the Defendants.

Plaintiff's reliance on Disotell v. Stiltner, 100 P.3d 890 (Alaska 2004) is misplaced. That case is distinguishable since there the defendant had denied the plaintiff access to the property (id. at 892), and also there was no dispute in that case as to the existence of a partnership. Nor did Disotell overrule Parker v. Northern Mixing Co., 756 P.2d 881, fn 24 (Alaska 1988), the case cited in Defendant's initial brief. The Defendants are not obligated to pay rent to Mardanlou when the existence of the partnership was in dispute and when Mardanlou himself did not seek to use the property or where the Defendants did not exclude or oust him from the property. Under such circumstances to award Mardanlou rent, on top of the half interest in the property, would be an unjust windfall and contrary to the law.

Moreover, awarding pre-judgment interest on the rent award was also reversible error under controlling Utah law. Rent damages that have been arrived at by an appraisal, as opposed to rent that has actually been paid for the use of the property, is not "a liquidated amount" as the plaintiff claims. (Appellee's Brief p. 30). Unlike the two cases cited by plaintiff, this issue was squarely addressed by this Court in Price-Orem v. Rollins, Brown & Gunnell, 784 P.2d 475, 483 (Utah App. 1989)(cited in Defendants' initial brief at p. 38), holding that prejudgment interest is not to be awarded on damages that are based on an appraisal of real property, since that damage amount "cannot be determined with mathematical precision," and is "far too uncertain to support a prejudgment interest award."

IV. PLAINTIFF'S CROSS-APPEAL IS WITHOUT MERIT THAT DISPUTES THE OFFSET FOR IMPROVEMENTS MADE TO THE PROPERTY AFTER PLAINTIFF LEFT IN 1997.

The District Court awarded Plaintiff a one-half interest in the real property of Access Auto upon finding that Plaintiff and Defendant Ali Ghaffarian were partners. However, inasmuch as the Defendants had made valuable capital improvements to the property after Plaintiff left on November 7, 1997 without any contribution from the Plaintiff, the District Court ruled that one-half of the cost value of those improvements was an offset to Plaintiff's interest. (R-1080, R-1222). This offset ruling by the District Court was correct, and Plaintiff's cross-appeal contending that Utah law does not support this offset is without merit.

At the April 3, 2003 evidentiary hearing to establish the amount of the offset, Defendants called three witnesses who testified that the cost or value of the post 1997 improvements to the property was $162,300. The improvements made were grading and paving 28,000 square feet of the property ($70,560); remodeling the interior of the building on the property ($13,800); installing a 36" diameter pipe and covering the 372 foot canal on the north border of the property ($39,300); and installing exterior site lighting poles ($38,640). (R-1293 at pp. 39-45, 56, 60-79; R-1028-32; R-1062-64; R-1023-24; R-1079; Defendants' April 3, 2003 Exh. 8, 10, and 12). The fact that these improvements were made, and the cost/value of those improvements, was not disputed by the Plaintiff with any contrary evidence.

Plaintiff's contention that no equitable offset should have been made against his court-awarded interest in the property for half of the cost of the post-1997 property improvements is without merit. Had the district court not provided this offset, Plaintiff would receive a windfall, and would be unjustly enriched, because he was awarded half the property in its improved state, yet he did not contribute to the cost of the improvements. See Ford v. American Express Financial Advisors, Inc., 98 P.3d 15, 37 (Utah 2004)("the offset theory is an equitable one: to avoid putting the plaintiff in a better position than he would have occupied but for the breach"); see also Fritch v. Fritch, 335 P.2d 43 (Wash 1959) ("respondent can be injured unjustly only if he does not receive contribution from appellant for improvements, made subsequent to the final decree, which enhanced the value of the property and enured to the benefit of both parties as co-tenants").

Also, the two cases cited by Plaintiff in his Brief (p.31) actually support the District Court's offset award. In Heiselt v. Heiselt, 349 P.2d 175 (Utah 1960), the first case cited by Plaintiff, the Utah Supreme Court upheld the District Court's decision, that, like in the instant case, required the co-tenant who was out of possession of the property to contribute to the cost of the improvements where they "never sought possession of the property" but just "stood by" while the improvements were made. Id. at 177, 179. In support of its ruling upholding the contribution award, the court stated:

> 'It follows that in passing on a claim for contribution arising out of the erection of improvements, all the circumstances of the case should be taken into consideration.

> Where it appears that the cotenant making the improvements has acted in good faith, without any design to injure or exclude his cotenants. . . the court may allow him the amount which represents the increase in the value of the estate.'

Id. at 179 (quoting 14 Am.Jur., Cotenancy, § 49, p. 115). Moreover, like in Heiselt, "no evidence" was cited by Plaintiff, nor was any introduced at the April 23, 2003 offset evidentiary hearing, "that appellant did not act in good faith" in connection with the improvements, or that the improvements were part of a "design to injure or exclude" the Plaintiff. Id.[7]

Plaintiff's second cited case, Gillmor v. Gillmor, 694 P.2d 1037 (Utah 1984), also supports the offset awarded to the Defendants. In that case, the court cited and followed its decision in Heiselt and held that the defendant was entitled to an offset for repairs made to a fence that directly benefitted Plaintiff because it bordered the Plaintiff's property, particularly where defendant was held liable for rent to plaintiff since he had refused plaintiff's request to access the property. Id. at 1040, 1042.

Plaintiff also contends that the offset was improper because he contends that Defendants "did not submit any hard costs of the improvements." Plaintiff cited no legal

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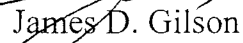
[7] The District Court implicitly determined that defendants improvements to the property were made in good faith by relying on Utah Code Ann. 57-6-3 in support of its offset ruling, R-1103, which statute has a "good faith" component. Plaintiff's claim that "the evidence indicates that Defendant did not act in good faith (R-129[2] at p. 518:20-519:2)" is false. Plaintiff again cites to the statement made by the District Court at the end of the trial on October 18, 2002, which had nothing to do with this property improvement issue or to Defendants' conduct after Mardanlou quit Access Auto, but was only in connection with the Defendants' argument that Nasrin Faezi-Ghaffarian was a co-owner in Access Auto. See supra p.8.

authority to support his argument, and he otherwise failed to preserve this issue for appeal since no objection was made by Plaintiff in that regard at the time of April 3, 2003 evidentiary hearing. (R-1293: pp. 15-111). Regardless, the law clearly allowed Defendants to establish the cost of the property improvements through summary expert testimony. See Utah R. Evid. 1006 (contents of voluminous documents may be presented in summary form for convenience); see also Heiselt, 349 P.2d at 179 ("the court may allow him the amount which represents the increase in the *value* of the estate") (emphasis added).

Due to the voluminous expense records in connection with the property improvements, and because some of the improvements were made through the Defendants' own labor, the evidence as to the cost or value of those improvements was made in summary form through the testimony of Ghaffarian, and by an accountant and a property appraiser, both of whom had access to and reviewed some of the actual receipts. (R-1293 at pp.63:16-25, 76:21-23, 79:4-23, 85:7-15, 86). The receipts were also at the court hearing had the Plaintiff desired to inspect them. (R-1293 at p. 56:4-10; R-1064).

CONCLUSION

Based on the foregoing, and for reasons in Appellants' initial brief, the Judgment of the District Court should be reversed and the case dismissed.

DATED this  day of August, 2005.

CALLISTER NEBEKER & McCULLOUGH

By ______________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) true copies of the foregoing **SECOND BRIEF OF DEENDANTS/APPELLANTS** was mailed postage prepaid on this 12 day of August, 2005, to the following:

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