

2004

Melvin J. Hunt v. Albert E. Hunt, Zera A. Hunt, and Douglas J. Hanks : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MELVIN J. HUNT
Plaintiff and Appellant,

vs.

ALBERT E. HUNT, ZERA A. HUNT,
and DOUGLAS J. HANKS,

Defendants and Appellees.

Court of Appeals No. 20041068-CA

REPLY BRIEF OF APPELLANT

**APPEAL OF THE JULY 7, 2004 RULING DENYING PLAINTIFF'S
REQUEST FOR JUDICIAL DISSOLUTION OF GOLD STREAM
CORPORATION, ENTERED IN THE FOURTH DISTRICT COURT,
UTAH COUNTY, PROVO DEPARTMENT, THE HONORABLE GARY D.
STOTT PRESIDING.**

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED
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REPLY BRIEF OF APPELLANT

POINT I

THIS COURT MAY NOT CONSIDER DEFENDANT HANKS'
INTRODUCTION OF NEW EVIDENCE NOT INCLUDED IN THE
RECORD

Defendant Hanks distorts the record by attempting to introduce evidence not found in the record. New evidence introduced by Defendant Hanks may not be considered by this court because it was not preserved in the record.

The appellate court may not consider Defendant Hank's arguments which rely on the introduction of new information because "[the appellate court] may weigh only those facts and legal arguments preserved for in the trial court record. Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah App.,1991); citing Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1358-59 (Utah App.1990). "Counsel's recollection of the course of proceedings is no substitute for a record of those proceedings." Olson, 815 P.2d at 1359.

In the state of Utah the district courts are the courts of record. Olson, at 1359; citing *e.g.*, State v. Suarez, 793 P.2d 934, 936 n. 3 (Utah App.1990); Utah Const., Art. VIII, § 1; Utah Code Ann. § 78-1-2 (1987). "The role of the appellate court is to sift the parties' arguments in light of 'the facts found by the trial court and square them with the law.'" Olson, at 1359; quoting State v. Vigil, 815 P.2d 1296, 1299. The appellate court "may...weigh only those facts and legal arguments preserved...in the trial court record." Olson, at 1359; citing Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1358-59 (Utah App.1990).

The only avenue available for a party to modify a record is Utah Rule of Appellate Procedure 11(h). “But a motion under Rule 11(h) is appropriate only when the record must be augmented because of an omission or exclusion, or a dispute as to the accuracy of reporting and not to introduce new material into the record., Olson, at 1359; citing State v. Moosman, 794 P.2d 474, 478-79 & n. 17 (Utah 1990).

In the current case Defendant Hanks has introduced new material that was not part of the original record. New material introduced by Defendant Hanks includes:

- Allegations that Defendant Hanks was not a shareholder in GSC. (Defendant’s Response Brief at 41, 46).
- Allegations that all GSC creditors, besides Defendant Hanks, had vacated their claims. (Defendant’s Resp. Br. at 16, 29, 48).
- Claims that Defendant Hanks was the only legitimate creditor of GSC. (Defendant’s Resp. Br. at 20, 48)
- Conversations between Defendant Hanks and the State of Utah regarding the dissolution of GSC. (Defendant’s Resp. Br. at 47).

None of these facts were alleged by Defendant Hanks at trial or prior to the completion of the record. Due to the fact that these allegations were not part of the original record Defendant Hanks argument’s surrounding these assertions cannot be considered.

POINT II

TRIAL COURT’S RULING SHOULD BE OVERRULED BECAUSE DEFENDANT HANKS ADMITS TO SELF-DEALING

In his brief, Defendant Hanks states that he was a GSC board member, a legitimate creditor of GSC, and that he voted to transfer the patent mining claims

to himself. (Defendant's Resp. Br. at 20, 31); Ex. 4: 57. The lower court ruling should therefore be overturned because Defendant Hanks admits to allegations made in the record regarding his engagement in self-dealing.

As stated in Plaintiff's opening brief, "Utah Supreme Court precedent establishes the illegality of directors preferring the payment of debts in which they have a personal stake, and the impropriety of even participating in transactions where the directors have a personal interest. Walker Bros. v. Eastern Motors Co., 262 P. 97, 98 (Utah 1927); Davis v. Heath Dev. Co. 558 P.2d 594, 596 (Utah 1976).

Defendant's statement that he voted to transfer the patent mining claims to himself as a director, and not as a shareholder, is an admission to self-dealing. (Defendant's Resp. Br. at 31). It is important to note that the impropriety of the transactions in Walker Brothers and in Davis came as a result of the directors, *and not the shareholders*, transferring corporate assets to satisfy a personal financial interest. See Davis 558 P.2d at 596; Walker Bros. 262 P. at 98.

Defendant Hanks also engaged in self dealing when he orchestrated a vote to transfer the mining claims to COG. *Regardless of the actual date of the incorporation of COG*, Defendant Hanks was still a majority shareholder in that corporation and a director in GSC when he transferred the mining claims to COG. Ex. 57 p. 2. Defendant Hanks ownership interest in COG in addition to his board position with GSC invalidated his transfer of the mining claims to COG because it constituted self dealing. See Davis 558 P.2d at 595.

Defendant acknowledges that he was a legitimate GSC creditor and that he orchestrated and voted for the transfer of the four patent mining claims to himself. This, in addition to his ownership interest in COG invalidated the transfers of the mining claims. Therefore, this case should be remanded to the lower court for judicial dissolution.

POINT III

JUDICIAL DISSOLUTION SHOULD BE GRANTED BECAUSE THE PATENT MINING CLAIMS WERE NOT TRANSFERRED IN ACCORDANCE WITH UTAH LAW

The transfer of the mining claims was invalid whether or not it followed the GSC articles of incorporation. The transfer was invalid because it was outside the ordinary course of business and GSC transferred all of its assets.

When a corporation conveys all of its assets Utah law, and not the articles of incorporation, determine the propriety the conveyance. The Utah Court of Appeals has held that when, outside the ordinary course of business, a corporation sells all of its assets, that the sale requires shareholder approval before the transaction can be deemed valid. Farr v. Brinkerhoff, 829 P.2d 117, 121 (Utah 1992); Utah Code Ann. § 16-10a-1202(1).

Utah Code Ann. § 16-10a-1202(1) states that to properly convey substantially all of a corporation's assets the corporation's board of directors must (1) adopt a resolution recommending the conveyance, (2) provide a written or printed notice of the resolution to each shareholder entitled to vote, and that (3) the resolution

must be adopted by the shareholders. Farr 829 P.2d at 120-121; Utah Code Ann. § 16-10a-1202(1).

On January 20, 2002 Defendant Hanks, acting as a GSC director, signed a quit claim deed which transferred the four patent mining claims to himself. (R. 482 at 209); Ex. 9. Three days later, on January 23, this transfer was proposed to, and voted on, by the shareholders. (R. 482 at 58-59: 22-25; 1-23). However, the greater part of the shareholders was never informed that the patent mining claims had already been transferred because the only vote concerning this transfer came three days after Defendant Hanks claims the mining claims had been transferred to him. (R. 482 at 60: 1-13). Consequently, Defendant Hank's orchestration of this vote was nothing more than a post hoc attempt to ratify a backroom deal.

Regardless of whether or not this backroom deal complied with GSC articles of incorporation it violated Utah Law. Because the transfer was made behind closed doors, and proper procedure was never followed, the trial court's ruling should be overturned and judicial dissolution granted.

POINT IV

THE DISTRICT COURT'S FINDING OF FACT SUPPORT PLAINTIFF HUNT'S REQUEST FOR JUDICIAL DISSOLUTION

GSC should be judicially dissolved because the trial court's finding of facts support Plaintiff Hunt's request for judicial dissolution. Utah Code Annotated § 16-10a-1430 establishes the grounds for judicial dissolution; the statute states in part that:

(2) A corporation may be dissolved in a proceeding by a shareholder if it is established that: ... (b) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; ... (d) the corporate assets are being misapplied or wasted.

The Trial Court's Findings of Fact support Plaintiff Hunt's petition for judicial dissolution. The trial court's findings of fact effectively recognize that Defendant Hanks, a director for GSC, acted in an oppressive or fraudulent manner when he withheld corporate documents from GSC shareholders, including Plaintiff Hunt. (R. 358-359). The trial court also found that GSC assets were being misapplied or wasted when it ruled that Plaintiff Hunt was a valid creditor of GSC but that Defendant Hanks received an exclusive award of GSC's corporate assets. (R. 359 ¶ 4; R. 360).


Defendant Hanks has not provided any authority or evidence to the contrary. Because the findings of fact support judicial dissolution and Defendant Hanks has not been able to explain why the finding of fact do support the lower court's decision, the lower courts ruling should be overturned.

CONCLUSION

The trial court erred when it held that the mining claims were properly transferred to Defendant Hanks therefore this case should be remanded for judicial dissolution.

DATED this 21st day of December, 2005.

FILLMORE SPENCER LLC



Mark D. Stubbs, Attorney for Appellant

CERTIFICATE OF SERVICE

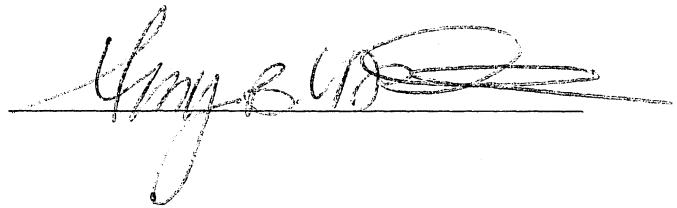
I certify that on the 21 day of December, 2005, I caused a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to be sent by the method(s) indicated below to the following:

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A handwritten signature in black ink, appearing to read "Douglas J. Hanks", is written over a horizontal line.