

1993

## Healey v. Prince : Reply Brief

Utah Court of Appeals

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EXHIBIT NO. 930759-CA

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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FRED HEALEY,	:	
	:	
Plaintiff and Appellant,	:	
vs.	:	
	:	
JOHN PRINCE,	:	Case No. 930759-CA
	:	
Defendant and Appellee.	:	
	:	Argument Priority No. 15

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AMENDED REPLY BRIEF OF APPELLANT

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On Appeal from the Judgment of the  
Third Judicial District Court for  
Salt Lake County, State of Utah

Judge J. Dennis Frederick

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John Prince

**FILED**

FEB 3 1994

**COURT OF APPEALS**

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There are no additional authorities cited in Appellant's Reply Brief which are not previously set forth in the original brief of Appellant.

### JURISDICTION OF THE COURT OF APPEALS

The original brief of Appellant was filed with the Supreme Court for the State of Utah on November 1, 1993. Pursuant to Rule 42, Utah Rules of Appellate Procedure, and an order of the Supreme Court, dated November 24, 1993, this matter was transferred to the Court of Appeals.

### DETERMINATIVE STATUTES

There are no constitutional provisions, statutes or ordinances which are at issue for this appeal.

### SUMMARY OF REPLY ARGUMENTS

The primary issue before this court is whether or not the trial court had sufficient evidence to find for counterclaimant, John Prince, and enter a monetary judgment against Fred Healey.

One of the issues at trial was whether or not an entity known as Income Fund should have been included in the transfer of assets. The trial court found there was sufficient evidence which would require the transfer of Income Fund. Appellant has not made any issues regarding Income Fund on appeal, yet the principal argument

set forth in the responsive brief of Appellee is that Income Fund should have been included in the transfer. That issue is not before this court.

The bulk of Appellant's brief was addressed towards the lack of evidence which the trial Court had, or in this case did not have, to render substantial monetary judgments against Fred Healey. In the responsive brief of Appellee, there is only cursory argument with regard to those money judgments, and at no time does Appellee set forth any reasonable evidence for the Court making that decision, and does not in any way refute the evidence which is set forth in Appellant's brief to show there was not a basis to enter the monetary judgments against Fred Healey.

Appellee attempts to set forth certain arguments regarding Appellant's failure to set forth the value of the partnership assets at the time of trial now precludes and order of the Court allowing the enforcement of the original Memorandum Agreement entered into between the parties. There is no legal basis for making such assertions, and therefore that portion of Appellee's brief is improperly before this Court.

### INTRODUCTION

Appellant, Fred Healey, (hereinafter "Healey"), by and through his counsel, Les F. England, hereby files with the above-captioned Court the following reply to those arguments and allegations as set forth in the Brief of Appellee.

Rather than give a detailed and redundant recitation of the arguments as contained in both Appellant's brief and Appellee's brief, Appellant will respond directly to those arguments as set forth in the Brief of Appellee.

### REPLY NO. 1

#### THE TRANSFER OF INCOME FUND IS NOT AN ISSUE FOR THE APPELLATE COURT TO ADDRESS

The First Argument and Second Argument, as set forth in the brief of Appellee (hereinafter referred to as "Prince"), sets forth arguments which are not at issue for this appeal. Prince spends substantial time, space and effort in his brief setting forth conclusions of law and findings of fact as to why the trial court was correct in determining that the entity known as Income Fund was included in the parties original agreement, and therefore properly determined by the trial court to be the property of Prince. Prince spends an inordinate amount of argument, strictly for the sake of argument, setting forth issues which are not before this Court.

Simply put, the transfer of Income Fund to Prince, as required by the trial court, has not been advanced by Healey as an issue to be determined on appeal. While it is true that Healey does not agree with the trial court, and does not believe Income Fund should

have been included in the transfer of assets, Healey does not assert in this appeal that the finding of Judge Frederick in that regard were an abuse of discretion, nor founded on an insufficient factual basis.

The only basis for inclusion of the Income Fund entity in the issues on appeal is whether or not the failure by Healey to transfer Income Fund was a material breach of the Memorandum Agreement. As set forth in both parties original briefs, the Memorandum Agreement is the only written agreement between the parties, and said agreement was the basis for the original complaint as filed by Healey against Prince.

Throughout trial there was no dispute as to whether Income Fund was included or not included in the transfer of assets between the parties. Prince felt, at some point, that Income Fund should have been included. Healey felt, early on, that Income Fund was not one of the entities that was included in the transfer of assets, because the parties did not have joint control over Income Fund. The dispute at trial was the parties interpretation of the agreement, not the actual transfer or lack of transfer of the entity. Both parties acknowledged the transfer was not made prior to trial.

Prince refers to testimony at trial which sets forth his belief, that Income Fund was part of the parties' joint business enterprise.

The statement is simply not true. The following testimony took place:



(Mr. Prince) "The best explanation I can give, Les, is I thought we were partners. It's really that simple. I didn't think about Income Fund. I didn't have any idea it was such a mammoth income creator. I just thought we were partners. . ." (R. 869, L. 19-23)

It is obvious from the foregoing exchange that Income Fund was not even contemplated by Prince until some time after the Memorandum Agreement was entered into, and even then, it was not discussed as being part of the deal, until Prince realized that it may be more than a liability, with some basis for income as well.

When Mr. Prince was examined regarding his understanding of what ownership, he had if any of Income Fund, he recited the following exchange from his deposition:

A: So at that point I would have owned whatever Healeys owned in Income Fund so after, I guess I would assume I owned it before-- I know-- I guess before that --I guess I wouldn't have owned it.  
(R. 869, L. 10-13)

There is no contradictory testimony to that cited above, and yet the Court seems to come to the conclusion that there was a willful, intentional withholding of Income Fund, by Mr. Healey, and yet even Mr. Prince believed that prior to the Memorandum Agreement he did not have any ownership interest in Income Fund, except for his limited partner shares, for which he had received identical payments as to those shares owned by Mr. Healey.

At trial, based upon the evidence, Judge Frederick made the finding that Income Fund was an entity that should have been transferred under the terms of the Memorandum Agreement.

Subsequent to trial, Healey has done everything to transfer his interest in Income Fund, and that transfer is not an issue for

the appellate Court to address.

REPLY NO. 2

THERE WAS NO EVIDENCE TO SHOW THE FAILURE OF HEALEY  
TO TRANSFER INCOME FUND WAS DONE IN BAD FAITH

Prince feels the need to argue matters not before this Court, by asserting that the failure of Healey to transfer Income Fund was done in bad faith, and therefore such behavior excused all other aspects of performance of the Memorandum Agreement.

As set forth in Healey's original brief, the evidence and testimony is voluminous that there were numerous entities which the parties acted as partners together, and Prince and Healey acknowledged that there were numerous entities, all of which were difficult to grasp. It is one thing for the Court to conclude that Income Fund should have been included in the transfer of partnership assets, but for the Court to reach the conclusion that Healey's failure to include Income Fund in the transfer of assets was done in bad faith is simply not supported by the evidence. In Prince's Second Argument he attempts to recite the Conclusions of Law and Findings of Fact which set forth Judge Frederick's ruling that the actions of Healey were done in bad faith, and further, that such actions were a breach of fiduciary duty by Healey. However, Prince makes no recitation to the record of any evidence which supports those bold conclusions and findings. As set forth numerous times, and as the principal basis for this appeal, there were simply insufficient facts to allow and otherwise permit the trial court to come to the conclusions that it did.

In page 23 of Prince's Brief, an additional redundant argument.

is made that as a General Partner of Income Fund, Healey caused a demand letter to be delivered to Prince for the payment of \$696,500.00. The demand letter was delivered on behalf of limited partners and had nothing to do with Healey. This action has no relevance, and what Prince failed to point out, as supported by uncontroverted evidence, is that Healey was the General Partner of Income Fund at Prince's insistence, and was not entitled to any more of the distributions from Income Fund than Prince, since both parties held identical limited partnership shares. The demand letter in question was in response to threats by other limited partners, with whom, both Prince and Healey would be equally liable. The demand letter in question was no more directed to Prince than to Healey. Healey would ultimately be responsible for any monies paid to other limited partners in the same proportion as Prince. In addition, Prince denied at all times, prior to any litigation, that there were any lease agreements which were signed beyond the original five year period, thereby excusing Prince of any further obligations. Those issues are contained in a completely separate lawsuit, and any reference herein is irrelevant to those issues presented to this Court. Once again, it is the blatant effort on the part of Prince to confound and otherwise circumvent the issues relevant to this appeal.

In addressing the issue of whether or not a material breach occurred, on page 25 of Prince's Brief, reference is made to "The trial court's conclusion of law in question was based upon Healey's refusal to convey those interest and Healey's failure to disclose

his prior financial self-dealings. When those elements are combined there is no question that a material breach occurred." The foregoing statement is not only offensive to Healey, but blatantly wrong, and not even part of the Court record. There was no discussion, evidence or testimony in regard to "Healey's prior financial self-dealings". Once again, a transparent attempt by Prince to circumvent the evidence and place statements before this Court which are simply not in existence. If in fact such evidence exists to support the findings of the Court, then why has Prince failed to set them forth in his argument?

REPLY NO. 3

PRINCE HAS FAILED TO ADDRESS THE  
DISTRIBUTIONS FROM INCOME FUND

In Prince's Fifth Argument, beginning on page 28 of his brief, Prince attempts to justify the determination of the trial court in finding that the distributions from Income Fund were not equal to both parties. Such contention is not supported by the evidence. The evidence, as marshalled in the best possible view to Prince, as set forth in the brief of Prince at page 29 was that Healey received \$13,750.00 more than Prince because he was the General Partner of Income Fund. It was at the insistence of Prince that Healey serve as General Partner of Income Fund, and it was never an issue at trial that Healey acted improperly or inappropriately as the general partner. (R. 667-668 L. 23-5). Without explanation, the trial court found that in regard to Income Fund, Healey received \$117,073.50 more than Prince, and awarded judgment for one-half of the amount (\$58,536.75). Even in the brief of Prince,

he does not advance any evidence, testimony, documents or even argument to justify the actions of the trial court. Even assuming, arguendo, that Healey was not entitled to the additional \$13,750.00, as a general partner, judgment should have been entered for one-half of the \$13,750.00, or \$6,875.00, not \$58,536.75. As further arguments are set forth, it becomes more obvious that the trial court simply adopted and otherwise signed the Proposed Findings of Fact and Conclusions of Law as submitted by Prince, without any thought or contemplation of its own.

REPLY NO. 4

PRINCE DOES NOT DISPUTE THAT THE  
ENTRY OF JUDGMENT AGAINST HEALEY  
IN THE SUM OF \$181,151.22 WAS IN ERROR

It is interesting that in the counterclaim of Prince, an accounting is requested, and in opening statements at trial the only thing requested was an accounting. At the conclusion of trial, even though Prince himself testified that misappropriation of partnership assets by Healey had never been a concern to him, the proposed findings of fact and conclusions of law submitted by Prince contained language and assertions for conversion and misappropriation of funds and partnership assets. The record is void as to any evidence to show misappropriation or conversion of partnership funds or assets.

From the very beginning of trial as contained in Prince's opening statement, the only thing requested by Prince is an accounting of the partnership assets. (R. 612, L.21-23).

A substantial portion of Healey's original brief was directed

towards the improper entry of judgment against Healey in the sum of \$181,151.22. The judgment amount of \$181,151.22 was based upon receipt by Healey of partnership funds in the sum of \$362,302.44 which were paid out for the benefit of partnership debts and obligations belonging to Healey and Prince. Prince had complete and total knowledge of the funds, and it was at his insistence that the transaction take place. At trial, there was no dispute as to how the monies were spent, and no dispute and disagreement by Prince that those monies were in fact paid towards joint debts and obligations which benefitted Prince and Healey. Even now, Prince does not have any dispute with the arguments set forth in the original brief of Healey, and has not directed any portion of this brief towards rebuttal of those arguments. Without any dispute between the parties, how can the Court come to the conclusion that over \$362,000.00 was taken by Healey?

Prince now finds himself in the unenviable position to defend the actions of the trial court, which actions are not supported by credible evidence. In the brief of Prince, there is no showing which would contradict the evidence and those arguments set forth in Healey's Brief, under Point Three.

On page 43 of Prince's Brief, the conclusive statement is made that "Substantial evidence exists in the record that supports the trial court's determination that Healey converted Prince's interest in monies received by the partnership or distributed from the partnership ventures and those findings and the conclusions of law related thereto should be upheld on appeal." Prince is correct in

the assertion that it is the duty and obligation of appellant to marshall the evidence in a manner to support the trial court. However, if Prince believes that Healey failed to marshall existing evidence, it would seem prudent for Prince to point out that same evidence which he believes was not properly marshalled. It is impossible, even for Mr. Prince, to marshall evidence which simply does not exist.

Even assuming the Court was justified in its decision to find in favor of Prince, the only monies argued by Prince, which argument was not that said monies were "converted" or "misappropriated", but rather only unexplained, was the sum of \$117,000.00. The Court, at best, was justified in entering judgment against Healey in the sum of \$58,500.00. (One-half of \$117,000.00). As stated earlier, the judgment against Healey in the sum of almost \$240,000.00 is not supported by credible evidence, and has even been admitted by Prince to be an improper amount. Prince has remained silent on the issue of judgments entered against Healey, for the obvious reason that he is in agreement that the trial Court erred in entering those judgments.

REPLY NO. 5

THE VALUE OF THE PARTNERSHIP HAS NO  
RELEVANCE TO THIS APPEAL

In the Sixth Argument of Prince's Brief, Prince asserts that since Healey failed to submit evidence as to the value of the partnership, he is now precluded from having judgment entered in his favor to otherwise enforce the Memorandum Agreement. Such an argument is ludicrous. The entire purpose of the Memorandum

Agreement was to set forth the specific amounts that would be paid by each partner, together with their understanding as to the dissolution of the partnership. The idea that additional proof was needed, when all specific amounts were set forth, is without logic.

Early on at trial, it was undisputed that Healey offered to buy the interests of Prince for the same amount he was willing to be paid. (R. 631, L. 12-20). If Prince believed that he was not receiving the proper value of the partnership, or the partnership was not worth those amounts, as set forth in the Memorandum Agreement, then why did he not accept the offer of Healey to buy his interest? The answer is obvious, and that would be that the amounts set forth in the Memorandum Agreement to pay to Healey for his interests were a bargain. There was no need at trial for Healey to set forth any additional values of the partnership. The value was set forth in the Agreement itself.

On pages 44 and 45 of Prince's brief, reference to Karen English, a witness called by Prince, and an accountant for Prince who examined all of the historical records of the partnership for a period of 10 months, was such that she could not reconcile all of the accounts, but on cross-examination the following dialogue took place:

Q. Why were you asked to go through all of these historical documents?

A. John (Prince) specifically asked me to put together a debt schedule to determine the maturity date



of notes, the long-term debts that were appearing on the balance sheets and to know what the payment schedules were. They were trying to determine when those notes would be paid in full.

Q. Were you ever asked by Mr. Prince to go through and find out what payments were made to Mr. Prince and what payments were made directly to Mr. Healey?

A. No.

Q. Did Mr. Prince ever indicate to you that Mr. Healey had taken funds from the partnership that he was not entitled to?

A. No.

Q. Did he (Prince) ever ask you to go through all of the records and see if there was an inequality of distribution between Mr. Prince and Mr. Healey?

A. No. (R. 1080, L. 6-25; R. 1080 L. 1)

In addition to the foregoing testimony, the Court accepted the proffer of Yvonne Failner who was the accountant for both parties, during their partnership relations. Yvonne Failner would testify that it was her job to physically prepare and deliver all checks of the partnership, and above all other things, she would always make certain that the checks payable to Mr. Prince and Mr. Healey were equal for the partnership management fees. (R. 1094, L. 18-25).

As stated earlier, there can be no misappropriation of partnership monies when there was not one witness, including those called by Mr. Prince who testified to any misappropriation. Any

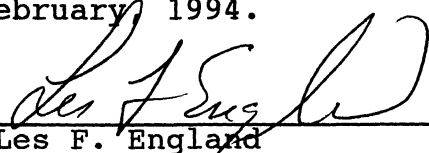
finding or conclusion by the Court that a conversion of partnership assets took place by Healey is simply without evidentiary and legal basis.

#### CONCLUSION

The trial court did not have sufficient evidence to determine that the Memorandum Agreement was null and void, and further that money judgment in the approximate amount of \$240,000.00 should have been entered against Healey. Even in the arguments propounded by Prince there is no argument or disagreement that the money judgments entered by the trial court were in error.

The proper remedy for the appellate court is to either remand this matter for new trial or to vacate the judgment entered and order enforcement of the Memorandum Agreement, executed by the parties herein. The one constant factor, agreed to by both parties, is that they executed the Memorandum Agreement with the expectation of being bound to the terms thereof.

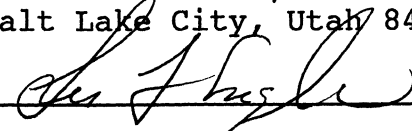
DATED this 3<sup>d</sup> day of February, 1994.

  
\_\_\_\_\_  
Les F. England  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

I hereby certify that on the 3<sup>d</sup> day of February, 1994, I hand-delivered, true and correct copies of the foregoing Reply Brief to the following:

Daniel Jackson  
215 South State, #1200  
Salt Lake City, Utah 84111

  
\_\_\_\_\_