

1994

VIDEO PUBLISHING VENTURES, INC., a
Colorado corporation, Plaintiff and Appellee, vs,
STANLEY R. HARTMARK. SIG SCHREYER,
HUGH D. GARDNER, and ALL MAKES
RENTALS, Defendants and Appellant : Brief of
Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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APPEAL

DOCKET NO. 940297

IN THE COURT OF APPEALS

STATE OF UTAH

VIDEO PUBLISHING VENTURES,
INC., a Colorado corporation,

Plaintiff and Appellee,

vs.

STANLEY R. HARTMARK, SIG
SCHREYER, HUGH D. GARDNER,
and ALL MAKES RENTALS,

Defendants and Appellant.

BRIEF OF APPELLANT

Appeal No. 940297-CA

Appeal for the Third District Court, Salt Lake County
Judge Glenn Iwasaki
Argument Priority No. 15

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FILED

Utah Court of Appeals

APR 19 1995

Marilyn M. Branch
Clerk of the Court

No Addendum

is Necessary

Pessi Ann Babalis

APPEAL

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)	
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JURISDICTION

The Supreme Court has original jurisdiction in this matter under Utah Code Ann. § 78-2-2(3)(j). This appeal was poured over to the Court of Appeals by the Supreme Court.

ISSUES PRESENTED

- I. THE TRIAL COURT'S RULING THAT THE MUTUAL RELEASE WAS NOT ENFORCEABLE IS CONTRARY TO ESTABLISHED LEGAL PRINCIPLES AND NOT SUPPORTED BY ITS FACTUAL FINDINGS.
 1. The trial court's legal conclusion that the release was unenforceable because there was not a meeting of the minds as to what consideration was being given in exchange for the release is a misapplication of the doctrine of "meeting of the minds."
 2. The trial court's ruling that there was no meeting of the minds as to the consideration being given is an illogical conclusion given the trial court's factual finding that Hartmark provided the consideration being claimed by VPV.
- II. THE TRIAL COURT'S CONCLUSION THAT THE CONSIDERATION GIVEN TO SUPPORT THE RELEASE WAS INADEQUATE WAS CONTRARY TO THE WELL-SETTLED CASE LAW IN UTAH.
- III. THE TRIAL COURT ERRED IN HOLDING HARTMARK RESPONSIBLE FOR THE \$10,370 CHECK MADE OUT TO SCHREYER BECAUSE THERE WAS NO EVIDENCE THAT HARTMARK PERSONALLY BENEFITTED FROM ANY CLAIMED BREACH OF FIDUCIARY DUTY.
- IX. THE TRIAL COURT ERRED IN REQUIRING HARTMARK TO REPAY THE \$10,000 CHECK FOR HIS COMPENSATION FOR HIS EFFORTS IN SETTING UP VPV WHEN THE TESTIMONY WAS THAT THERE WAS AN AGREEMENT AMONG THE PRINCIPALS OF VPV THAT HE WAS ENTITLED TO AN AMOUNT IN EXCESS OF THE CHECK.
- X. THE TRIAL COURT USED AN ERRONEOUS METHOD TO CALCULATE PLAINTIFF'S DAMAGES FOR CONVERSION OF THE CELLULAR PHONE AND THERE WAS NO EVIDENCE SUBMITTED TO MAKE THE PROPER CALCULATION.
- XI. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO VPV WHEN THERE HAD NEVER BEEN A DETERMINATION OF ENTITLEMENT TO FEES.
- XII. THE TRIAL COURT ERRED IN AWARDING VPV THE COSTS OF ITS DEPOSITIONS.
- XIII. THE TRIAL COURT ERRED IN REFUSING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.
- XI. HARTMARK IS ENTITLED TO COSTS AND ATTORNEY FEES AT TRIAL AND ON APPEAL DUE TO VPV'S BREACH OF THE RELEASE.

DETERMINATIVE STATUTES

There are none.

STATEMENT OF THE CASE

This appeal is from a final judgment in favor of appellee, VIDEO PUBLISHING VENTURES, INC., (hereafter "VPV"), following a bench trial in the Third District Court before Judge Glenn Iwasaki.

VPV was a video production company which was operating out of the Osmond Studio in Orem. The company was originally based in Colorado before it was purchased and moved to Utah. Appellant Hartmark was involved in the purchase and reorganization and relocation of VPV and became the financial Vice President. His duties included paying the debts of the company.

After several years of unprofitable operations, VPV was in financial difficulties. Internal disputes over management arose between Hartmark and Sterling Martell, President of VPV. Hartmark decided to resign. Shortly thereafter, VPV ran out of money and ceased operations. Over two years later, VPV brought this lawsuit against Hartmark, et al.,¹ claiming that Hartmark owed VPV money for alleged misconduct during his employment.

Hartmark originally brought a Motion to Dismiss claiming that Sterling Martell was not entitled to pursue the action against him on behalf of VPV. That motion was unsuccessful. VPV sought attorney fees for successfully defending against the motion. Judge Scott Daniels, who was originally assigned to this case and subsequently retired from the bench, did not award attorney fees at

¹. The remaining defendants settled their disputes with VPV prior to trial and are not parties to this appeal.

that time but rather, took the question of attorney fees under advisement. The case was subsequently assigned to Judge Iwasaki.

At the close of appellee's case, appellant Hartmark moved to dismiss based on a general release signed by both Hartmark and VPV on the day Hartmark resigned as Vice President of VPV. The release mutually released each party from any and all claims against the other "and more specifically a cause of action arising out of Mr. Hartmark's employment as an officer of VPV." The release was drafted by VPV's attorney who advised VPV to sign the release and was present when it was signed.

VPV argued that the release was not enforceable because VPV signed it under "financial or economical duress." VPV claimed that Hartmark would not surrender certain company records in his possession as Vice President, particularly the company checkbook, until he was given a release. Appellee also claimed that there was no consideration given for the release because the records and checkbook, which Hartmark purportedly exchanged for the release, belonged to VPV.

Hartmark disputed appellee's factual claim that he refused to surrender the company records in his control until he was given the release. He also countered VPV's claim of "financial duress" by showing that the Utah Supreme Court has previously ruled that "financial duress" is not a ground for setting aside a release. He countered the "lack of consideration" argument by showing that the Utah Supreme Court has held that mutual releases are, in and of themselves, adequate consideration.

The trial court, nevertheless, denied Hartmark's Motion to Dismiss by ruling that the release was not an enforceable contract because there was not a meeting of the minds as to the consideration and that the consideration was inadequate. (See pages 265-67 of the transcript for the trial court's ruling.) The trial court then proceeded with the trial and ultimately dismissed many of the claims against Hartmark, but held that Hartmark should repay VPV on a few of the claims and entered judgment against Hartmark for \$18,689.68.

Hartmark claims that the trial court erred in refusing to enforce the general release and that the entire judgment should be reversed and all of VPV's claims be dismissed as barred by the release. In the alternative, Hartmark claims that the trial court made several errors in holding him liable to VPV on each of the individual claims.

STATEMENT OF FACTS

1. Pursuant to the terms of his employment agreement with VPV, Hartmark was entitled to a salary and reimbursement of expenses as Chairman of the Board of Directors and as Vice President of VPV in charge of VPV's financial affairs. (Trans. pp. 211, 213, 285-86)

2. As the financial officer, Hartmark was responsible for signing virtually all checks on behalf of VPV. (Trans. pp. 80, 174)

3. The officers of VPV agreed in December, 1988, that Hartmark was entitled to receive \$11,208 as compensation for his

efforts expended in 1988 in creating VPV, as well as reimbursement for his expenses incurred. (Trans. pp. 289-90)

4. Hartmark signed Check No. 1177, made out to himself, in the amount of \$10,370, to compensate himself for his efforts, and reimburse his expenses, in setting up VPV, pursuant to the December 1988 agreement of the officers of VPV, that he was entitled to \$11,208. (Trans. pp. 83-88 and D-Ex. 22)

5. Echochem was a holding company which owned a majority of VPV's stock and was owned by Sterling Martell, President of VPV, Hartmark, Hugo Gardner, a Director of VPV, Sig Schreyer, and Peter Hirschberg. (Trans. pg. 170)

6. Echochem borrowed \$10,000 from Schreyer to make a payment to Eva Heiner for stock of another company it was purchasing from Heiner. (Trans. pg. 170)

7. VPV owed Echochem an amount greater than the amount Echochem owed to Schreyer. (Trans. pg. 424)

8. Hartmark, Gardner and VPV's attorney, Ron Vance, met and discussed whether VPV could repay the debt to Schreyer, and Vance gave his approval since VPV owed Echochem money. (Trans. pp. 375, 424)

9. Hartmark wrote Check No. 1217 to Sig Schreyer, in the amount of \$10,370, to repay the debt of Echochem to Schreyer. (P-Ex. 1)

10. Vance, as VPV's legal counsel, did not believe that the check to Schreyer was in any way illegal, but was perhaps simply an accounting error. (Trans. pp. 439-40)

11. Hartmark resigned from his position as the Vice President of VPV on June 2, 1989.

12. Hartmark admitted that he took a cellular telephone and desk with him when he left VPV in exchange for other personal property belonging to him which was needed by VPV. (Trans. pg. 98)

13. Gardner, as a director of VPV, requested that Vance prepare a general mutual release for Hartmark, and Vance prepared the release which was paid for by VPV. (Trans. pp. 107-109, 381-82, 420)

14. On the day that Hartmark resigned, Hartmark and Martell, on behalf of VPV, entered into and signed the mutual release prepared by Vance wherein Hartmark and VPV, in exchange for the mutual release of the other, released each other from any and all claims each may have against the other. (D-Ex. 21)

15. The release stated as follows:

GENERAL RELEASE

Video Publishing Ventures, Inc., a Colorado corporation ("VPV"), and Stan Hartmark, for and in mutual consideration, the receipt and sufficiency of which is hereby acknowledged, have remised, released, and forever discharged and by these presents do for each other, their heirs, executors, administrators and assigns, remise, release and forever discharge each other their heirs, executors, administrators, successors and assigns of and from all and any manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law, or in equity, which against either party the other ever had, now has or which the heirs, executors, or administrators of either party, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the

beginning of the world to the date of these presents and more specifically a cause of action arising out of Mr. Hartmark's employment as an officer of VPV.

IN WITNESS WHEREOF, the parties hereto have executed this General Release at Salt Lake City, Utah, on this 2nd day of June, 1989.

VIDEO PUBLISHING VENTURES, INC.

by /s/
Sterling Martell, President

 /s/
Stan Hartmark, Individually

16. Hartmark never told either Martell or Owens that he would not surrender the checkbook, he claimed that he did not have the checkbook. (Trans. pp. 120-21, 220)

17. Vance told Martell and Owens that they could not obtain the checkbook until VPV signed the release. (Trans. pp. 120-21, 220)

18. Hartmark signed the release at Vance's office after which time Martell signed the release at the direction of Tom Owens, a consultant to VPV, while sitting in Vance's automobile at the Draper off-ramp of I-15. (Trans. pg. 122)

19. Immediately after signing the release, Martell and Owens went to Vance's office and were given VPV's checkbook by either Vance or his secretary. (Trans. pg. 155)

20. The trial court found that Hartmark had in fact refused to surrender VPV's checkbook until VPV signed the release because it did not believe that it was a coincidence that the checkbook was available at Vance's office immediately after the

signing of the release by Martell. (Trans. pg. 4 - Trial Court's Ruling)

COURSE OF PROCEEDINGS

Appellee filed suit against Stanley R. Hartmark to determine Hartmark's liability to appellee regarding Hartmark's conduct as an officer and director of the appellee corporation, more specifically, a claim that Hartmark owed VPV money for alleged misconduct during his employment.

Hartmark originally brought a Motion to Dismiss claiming that appellant was not entitled to pursue the action against him based upon the theory that the representatives of appellant did not have authority to bring the action against another corporate officer of appellant. That motion was denied.

FINAL DISPOSITION

After a two day bench trial, a final judgment was entered against Hartmark. Hartmark appeals.

STANDARD OF REVIEW

Each error asserted in this case is a legal error and is, therefore, to be reviewed by the Court for correctness, requiring no deference to the trial court's rulings.

SUMMARY OF ARGUMENTS

There were several errors committed by the trial court in its application of the law to the facts presented in this case, any of which requires reversal of the trial court's awarding judgment to VPV.

(1) The trial court's ruling that the mutual release was not enforceable is contrary to established legal principles and not supported by its factual findings.

(2) The trial court's conclusion that the consideration given to support the release was inadequate was contrary to the well-settled case law in Utah.

(3) The trial court erred in holding Hartmark responsible for the \$10,370 check made out to Schreyer because there was no evidence that Hartmark personally benefitted from any claimed breach of fiduciary duty.

(4) The trial court erred in requiring Hartmark to repay the \$10,000 check for his compensation for his efforts in setting up VPV when the testimony was that there was an agreement among the principals of VPV that he was entitled to an amount in excess of the check.

(5) The trial court used an erroneous method to calculate plaintiff's damages for conversion of the cellular phone and there was no evidence submitted to make the proper calculation.

(6) The trial court erred in awarding attorney fees to VPV when there had never been a determination of entitlement to fees.

(7) The trial court erred in awarding VPV the costs of its depositions.

(8) The trial court erred in refusing to enter written Findings of Fact and Conclusions of Law.

(9) Hartmark is entitled to costs and attorney fees at trial and on appeal due to VPV's breach of the release.

Any of the foregoing errors, with the exception of the award of attorney fees, standing alone, requires complete reversal of the trial court's judgment in the VPV's favor.

CALENDARING

If, in accordance with established case law, the trial court's failure to enforce the mutual release is reversed and the judgment reversed, this appeal may clearly be dealt with in an unpublished opinion. It would, on the other hand, require new law to uphold the trial court's ruling that the release was unenforceable, and therefore would require a published opinion if the trial court is affirmed on that question. Furthermore, if the release is not upheld, and the alternative arguments must be addressed, there are questions in the remaining issues dealing with specific awards by the trial court which would require published opinion since they involve the creation of new law. In particular, the questions concerning the trial court's finding that there was a breach of fiduciary when there was no personal benefit proved and the question of whether VPV's settlement with Sig Schreyer constituted an accord and satisfaction of any claim concerning Hartmark. Other various rulings by the trial court would also require a published opinion if they are upheld since they would constitute new law at odds with existing law.

ARGUMENTS

I. THE TRIAL COURT'S RULING THAT THE MUTUAL RELEASE WAS NOT ENFORCEABLE IS CONTRARY TO ESTABLISHED LEGAL PRINCIPLES AND NOT SUPPORTED BY ITS FACTUAL FINDINGS.

When Hartmark claimed that the mutual release barred VPV's claims against him, the trial court denied the motion, ruling that there was no meeting of the minds as to the consideration being given by Hartmark in exchange for the release and that the consideration given for the release was inadequate. The court ruled from the bench:

In this matter there seems to be primarily, number 1, a nonmeeting of the minds, therefore, it is not a mutual agreement that was entered into between the parties. The testimony which is prevailing in this matter from plaintiffs was that the reason why they had executed this general release was to secure the books and financial records as well as the checkbook in question, and although it was partially due to financial stress, that was their main motivation for signing the release.

On the other hand, as was argued very effectively but to no avail by Mr. Bond, that the release was a mutual release based upon certain consideration that was given up by the plaintiff, meaning that they would not go after further action against the defendant and also the defendant would waive any further action against the plaintiff, if necessary. With those two positions it seemed very apparent that there was not a meeting of the minds as to what was contemplated by the release, what consideration if any was given.

Issue of Consideration. The Court has to look at the sufficiency or even adequacy of the consideration. The court is convinced the consideration, if any at all, would be the return of certain property which was rightfully the property of the plaintiff in the first place, therefore, it is insufficient consideration in that sense.

1. The trial court's legal conclusion that the release was unenforceable because there was not a meeting of the minds as to what consideration was being given in exchange for the release is a misapplication of the doctrine of "meeting of the minds."

The trial court ruled, on its own initiative, that there was no meeting of the minds as to the consideration being exchanged for the release.² This was a misapplication of the doctrine.

The meeting of the minds doctrine requires that the parties agree as to the terms of the contract, i.e., what is expected of the parties. "Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." Cessna Fin. Corp. v. Meyer, 575 P.2d 1048, 1050 (Utah 1978).

². VPV never claimed in the presentation of its case that there was not a meeting of the minds on the consideration for the release. See Trans. pg 243-57 for VPV's arguments as to why the release was unenforceable. The trial court on its own initiative created the "meeting of the minds" argument for VPV, and then ruled favorably upon its own theory.

It is well settled that a tribunal may not raise theories on behalf of a party. Trial courts may not base their rulings on issues which are not "an expressed or implied part of [a party's] theory." Chevron U.S.A., Inc., v. Utah State Tax Commission, 847 P.2d 418 (Utah App. 1993). The sua sponte raising of theories causes the tribunal to depart from its passive, impartial role and become an active advocate on behalf of one of the parties.

The interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead, it not having been litigated at the time of trial.

Girard v. Appleby, 660 P.2d 245 (Utah 1983).

At no time in the present case did VPV ever attack the release for a lack of a meeting of the minds. Had the trial court not raised the theory sua sponte, it would never have been raised by VPV, since VPV had already rested its case. Any "meeting of the minds" challenge to the release was waived by VPV because VPV did not raise it. Since the trial court's ruling was beyond the theory presented by VPV, it was a nullity and should be summarily reversed. Chevron, 847 P.2d 418.

There was no dispute in this case as to the written terms of the release and what the release formally requires of the parties. It unequivocally provides that each party was releasing the other from all claims. The release was plain and unambiguous on its face, and therefore should have been enforced as written. John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205 (Utah 1987).

The trial court's failure to recognize the unambiguous meeting of the minds of Hartmark and VPV as recorded on the face of the release was reversible legal error in and of itself, and is grounds for a reversal in this case without any further discussion. We will, nevertheless, address the flaws of the trial court's analysis to assist the Court.

The trial court's confusion arose when it violated the parole evidence rule and looked beyond the face of the release and tried to determine why the parties were willing to enter into the release. It concluded, erroneously, that there was not a meeting of the minds because there was an additional, unwritten, reason for VPV entering into the release.

The trial court believed VPV's testimony that Hartmark refused to surrender the checkbook unless he received a mutual release, and that the "main motivation" of VPV in signing the release was to recover the checkbook. This factual finding was in direct conflict with Hartmark's testimony at trial that he did not have the checkbook in his possession at the relevant times, and that he did not demand the release before he would surrender the checkbook.

Somehow, the trial court concluded that since Hartmark testified that he did not demand the release in exchange for the checkbook, and VPV claimed that he did demand the release in exchange for the checkbook, that there was no meeting of the minds as to what consideration was being given by Hartmark in exchange for the release and, therefore, the release is unenforceable. This conclusion is a clear misapplication of the "meeting of the minds" doctrine.

This difference in perception, as to whether Hartmark promised to surrender the checkbook in exchange for the release, does not mean that the parties did not have a "meeting of the minds." From an analytical standpoint, the fact that Hartmark provided the full consideration claimed by VPV makes any dispute over whether the parties had a meeting of the minds moot.

The meeting of the minds doctrine arises when a party refuses to perform an alleged term of a contract because the party claims it did not agree to perform that term. The doctrine then excuses the protesting party from performance of the disputed term under the theory that the disputed term was never agreed upon.

If a disputed term has already been performed, or consideration provided as in this case, there is no need to utilize the doctrine. There is no need to excuse Hartmark from delivering the checkbook when VPV has already been given the checkbook. Any lack of a meeting of the minds as to what consideration was being given for the release was cured on June 2, 1989, when VPV actually received the checkbook. Consequently, any question as to whether

the parties had a meeting of the minds regarding the checkbook was rendered moot.

By applying the meeting of the minds doctrine to this case, the trial court has not excused any performance of a disputed term. Rather, the trial court has allowed VPV to refuse to perform its part of the bargain after Hartmark has fully provided all consideration required from him. This inequitable result is clearly not an appropriate application of the doctrine.

- 2. The trial court's ruling that there was no meeting of the minds as to the consideration being given is an illogical conclusion given the trial court's factual finding that Hartmark provided the consideration being claimed by VPV.**
(Trans. pp. 22-24 of closing arguments)

The apparent inconsistency in expectations as to the consideration being given for the release is also immaterial in this case because the discrepancy is eliminated by the trial court's factual finding that Hartmark, contrary to his testimony, did in fact refuse to surrender the checkbook until after the release was signed. In other words, the trial court found that Hartmark expected to deliver both his promise to forbear and the checkbook in exchange for the release, and VPV expected to receive both Hartmark's promise to forbear and the checkbook in exchange for the release.

Based on the trial court's factual findings, there was no inconsistency between the mindsets of the two parties to the contract. Both expected, and in fact received, the exact consideration for which the trial court found they bargained. They had a meeting of the minds. The only logical conclusion the trial

court could make is that there was a meeting of the minds as to what consideration was given.

The trial court's ruling that there was not a meeting of the minds is not only a misapplication of the doctrine, it is contrary to its own factual findings that Hartmark and VPV had the same mindset.³ It must, therefore, be reversed.

II. THE TRIAL COURT'S CONCLUSION THAT THE CONSIDERATION GIVEN TO SUPPORT THE RELEASE WAS INADEQUATE WAS CONTRARY TO THE WELL-SETTLED CASE LAW IN UTAH. (Trans. pg. 241)

In ruling that there was inadequate consideration given for the release, the trial court stated:

The court is convinced the consideration, if any at all, would be the return of certain property which was rightfully the property of the plaintiff in the first place; therefore it is insufficient consideration in that sense. (Trans. pg. 267)

Even assuming that the return of VPV's property, standing alone, would not constitute adequate consideration to support the release, there is other adequate consideration to support the release. The trial court's legal conclusion totally ignores,

³.

Consideration is an act or promise, bargained for and given in exchange for a promise. Simmons v. California Institute of Technology, 34 Cal. 2d 264, 272, 209 P.2d 581, 586 (1949); See Colorado National Bank of Denver v. Bohm, 286 F.2d 494, 496 (9th Cir. 1961). Promises made by a party pursuant to a bilateral contract to do an act or to forbear from doing an act that would be detrimental to the promisor or beneficial to the promisee may constitute the consideration for the other's promise. Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980); Allen v. Rose Park Pharmacy, 120 Utah 608, 613, 237 P.2d 823, 825 (1951). For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties. Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924).

without any legal basis or explanation, the unambiguous written mutual promises of VPV and Hartmark to release all claims and forbear from suing each other. Such mutual promises, without anything more, are clearly adequate consideration for each other as a matter of law. Allen v. Rose Park Pharmacy, 120 Utah 608, 613, 237 P.2d 823, 825 (1951). The Court expressly held in Allen that, "mutual promises in each of which the promisor undertakes some act of forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee and neither of which are void, are 'sufficient consideration' for one another." Id.

Hartmark, by signing the release, promised to forbear from suing VPV. This was a promise detrimental to him and beneficial to VPV.⁴ His promise to forbear, therefore, constitutes adequate consideration for VPV's promise to forbear -- even if the surrender of the checkbook is not included as consideration. The trial court's failure to recognize the legal effect of the mutual promises was an error of law which must be reversed.

Inasmuch as the trial court's ruling that there was no meeting of the minds was a misapplication of the doctrine, and its conclusion that there was no adequate consideration to support the release violated well-established Utah law, the trial court's ruling that the release was not valid was erroneous. The trial court's failure to dismiss VPV's complaint was therefore reversible

⁴. VPV should be estopped from asserting that the release is unenforceable. Hartmark has honored his promise to forbear and did not bring various claims which he could have asserted against VPV. Had he done so, such claims could have offset the judgment awarded against him. To allow VPV to now renege on its promise to not bring any action against Hartmark is inequitable.

error. Hartmark is entitled to have the entire judgment against him reversed.

Hartmark argues in the alternative that the trial court erred in reaching each of the awards as set forth below.

III. THE TRIAL COURT ERRED IN HOLDING HARTMARK RESPONSIBLE FOR THE CHECK MADE OUT TO SCHREYER BECAUSE THERE WAS NO EVIDENCE THAT HARTMARK PERSONALLY BENEFITTED FROM ANY CLAIMED BREACH OF FIDUCIARY DUTY. (Trans. pp. 18-19 of closing arguments)

Echochem owed \$10,000 to Schreyer, but it didn't have the money to pay him. VPV owed Echochem more than enough to pay the debt to Schreyer. Hartmark, along with Gardner, consulted VPV's attorney who advised him that it was permissible for VPV to pay Echochem's debt to Schreyer so Hartmark made out Check No. 1217, payable to Schreyer in the amount of \$10,370. VPV claimed that this was a breach of his fiduciary duty without ever explaining how it was a breach.

VPV's own attorney testified that in his legal opinion there was nothing illegal about the payment to Schreyer, only that the manner of repayment was "sloppy" from an accounting point of view. (Trans. pp. 439-40) There was no contradiction of this testimony by VPV. Hartmark merely followed his lawyer's advice.

Without any legal analysis or support for its conclusion, the trial court held that Hartmark had made an unauthorized payment. The trial court never explained how this amounted to a breach of his fiduciary duty. Nor is there any legal explanation as to why Hartmark should be personally liable for writing the check to Schreyer when VPV failed to prove that Hartmark personally benefited from the check to Schreyer. If Hartmark did not receive

any personal benefit from the check, where is his conflict of interest that would constitute a breach of his fiduciary duty?

As a matter of law, Hartmark did not breach any fiduciary duty. He acted on the advice of VPV's attorney. At best, he may have made a mistake in judgment, but such mistakes in business judgment do not constitute a breach of fiduciary duty so as to create personal liability.

IV. THE TRIAL COURT ERRED IN REQUIRING HARTMARK TO REPAY THE \$10,000 CHECK FOR HIS COMPENSATION FOR HIS EFFORTS IN SETTING UP VPV WHEN THE TESTIMONY WAS THAT THERE WAS AN AGREEMENT AMONG THE PRINCIPALS OF VPV THAT HE WAS ENTITLED TO AN AMOUNT IN EXCESS OF THE CHECK. (Trans. pp. 14-16 of closing argument)

The trial court ruled that there was "no competent evidence" that Hartmark was entitled to \$10,000 in compensation and reimbursement for his efforts in setting up VPV, and therefore required him to repay the \$10,000 check. The ruling is contrary to the evidence presented by Hartmark, Gardner, and Vance that there was an agreement between the principals of VPV that he was entitled to more than \$10,000, evidenced in a memorandum, which was introduced without objection into evidence as exhibit D-22. Such evidence was clearly competent. Whether or not evidence is competent is a legal question, reviewable for correctness. Since there was not any objection to the competency of the evidence of the agreement, the trial court's ruling is clearly erroneous.

V. THE TRIAL COURT USED AN ERRONEOUS METHOD TO CALCULATE PLAINTIFF'S DAMAGES FOR CONVERSION OF THE CELLULAR PHONE AND THERE WAS NO EVIDENCE SUBMITTED TO MAKE THE PROPER CALCULATION. (Trans. pg. 20 of closing arguments)

The trial court found that Hartmark converted the cellular telephone and awarded damages in the amount of \$950. The

trial court took the purchase price -- \$1,000 -- and subtracted the value of the phone at the time of trial -- \$50. (Trans. pg. 3 of trial court's ruling) This is not the appropriate method of determining damages.

The Court of Appeals explained in Henderson v. For-Shor Co., 757 P.2d 465, 468 (Utah App. 1988), that the appropriate measure of damages for conversion is the fair market value of the property at the time of the conversion. "[I]n order to be entitled to recover his actual damages, the claimant must provide some competent evidence of the property's fair market value at the time and place of conversion." Frost v. Eggeman, 638 P.2d 141, 144 (Wyo. 1981).

Since there was absolutely no evidence introduced at trial as to the fair market value at the time of the conversion, plaintiff, VPV, failed to prove its case. VPV conceded in its closing arguments that they were going from the new price of \$1,000. (Trans. pg. 29 of closing arguments) Consequently it is not entitled to any damages for its alleged conversion of the telephone. The trial court's erroneous award should therefore be reversed.

VI. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO VPV WHEN THERE HAD NEVER BEEN A DETERMINATION OF ENTITLEMENT TO FEES.
(Trans. pg. 485)

This case was originally assigned to Judge Daniels who entertained a motion by Hartmark to dismiss for lack of corporate authority to bring the lawsuit. Hartmark's motion was unsuccessful because Judge Daniels held there was a question of fact. VPV sought attorney fees claiming that the motion was frivolous. Judge

Daniels took the request for attorney fees under advisement for later determination depending on the success of the factual claim.

Hartmark was unsuccessful on the facts so VPV renewed its request for attorney fees. Without any ruling as to why VPV was entitled to attorney fees, Judge Iwasaki set the amount of fees at \$500. There has never been a determination and/or ruling that VPV is entitled to any fees. An award of fees without a determination as to entitlement, is erroneous as a matter of law. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). The trial court's award of \$500 in legal fees should therefore be reversed.

VII. THE TRIAL COURT ERRED IN AWARDING VPV THE COSTS OF ITS DEPOSITIONS. (Record pg. 484)

The trial court erroneously awarded VPV \$682.20 for the depositions of Hartmark and Gardner, and for copy costs of the depositions of its own witnesses, Martell and Owens. It is well-settled law in Utah that deposition costs are not recoverable unless the depositions "appeared essential for the development and presentation of the case. Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990). Depositions are necessary only when the complex nature of the case prevent a party from completing discovery through less expensive means. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988). The party seeking recovery of deposition costs has the burden of proving the necessity of the deposition. VPV presented no explanation as to why it could not have performed discovery through less expensive means such as interrogatories and request for production of documents. At best, VPV merely claimed that the depositions were in fact used and were helpful. This does not satisfy VPV's burden

of proof. Consequently the award of deposition costs should be reversed.⁵

VIII. THE TRIAL COURT ERRED IN REFUSING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW. (Record pg. 481)

The trial court entered its rulings from the bench with minimal out findings. Its rulings did not address or resolve many of the disputed facts in this case, nor do they set forth the trial court's full analysis. The trial court's rulings are ambiguous and incomplete in many respects. It is a denial of due process for a tribunal to not enter adequate findings that reveal the trial court's analytical process in reaching its decision. Adams v. Board of Review of the Industrial Commission, 821 P.2d 1 (Utah App. 1991). Whether the findings are adequate is a question of law which this Court may review for error. Id. Many of the factual disputes in this case have more than one possible resolution. Given such a "matrix" of possible findings, the trial court's findings may not be implied. Id. Hartmark specifically requested that VPV set forth complete findings of fact, but VPV refused. Any lack of findings should therefore be found or implied in Hartmark's favor.

IX. HARTMARK IS ENTITLED TO COSTS AND ATTORNEY FEES AT TRIAL AND ON APPEAL DUE TO VPV'S BREACH OF THE RELEASE. (Record pg. 435; Trans. pg. 258)

Hartmark requested attorney fees below, as damages for VPV's filing of this case in contravention of the release, but was

⁵. VPV claim \$106.95 in copying costs for copies of the depositions of its own witnesses. Such a claim is totally without legal support in the code, the rules of civil procedure, or case law. Even if the costs of the depositions are allowed on appeal, the award must be reduced by the \$106.95 copying costs.

denied based on the trial court's erroneous ruling that the release was unenforceable. Hartmark renews that request at this time, and he requests his attorney fees and costs on appeal should he prevail in reversing the trial court's ruling invalidating the release. As a direct result of VPV's filing of the suit below, in contravention of the release, Hartmark has been forced to incur attorney fees below and on appeal, which fees are a reasonably foreseeable consequence of VPV's breach of the release.

An appellant which prevails on appeal, may be awarded attorney fees as part of the appeal even though the appellant was not awarded fees below if the appellant would have been entitled to fees below had the trial court made the proper ruling as determined on appeal. AAA Fencing Co. v. Raintree Dev. & Energy, 714 P.2d 289 (Utah 1986). Had the trial court properly applied the law below and recognized the validity of the release, Hartmark would have been entitled to his attorney fees as a reasonably foreseeable consequence of VPV's breach of the release. Hartmark, therefore, respectfully requests an award of fees should he prevail.

CONCLUSION

The trial court's invalidation of the General Release agreement was a misapplication of the doctrine of the meeting of the minds. It was also contrary to the factual findings of the trial court which showed that both parties expected, and in fact received, the exact same consideration. The trial court's conclusion that there was not adequate consideration to support the release is directly contrary to Utah case law which states that mutual promises to forbear constitute consideration for each other

without any additional consideration. The entire judgment should therefore be reversed and the matter remanded to the trial court to allow the trial court to determine Hartmark's damages, including attorney fees at trial and on appeal, for VPV's breach of the release.

If the Court concludes that the release was unenforceable, then Hartmark argues that the trial court committed error with respect to each award which require that each award be reversed individually as specifically set forth above.

DATED this 13th day of April, 1995.

SMITH & HANNA

By: Perri Ann Babalis
F. Kevin Bond
Perri Ann Babalis

No Addendum is Necessary

Perri Ann Babalis

CERTIFICATE OF HAND DELIVERY

AB I hereby certify on the 13th day of April, 1995, a ~~true~~
~~and~~ correct copy of the foregoing BRIEF OF APPELLANT was hand
delivered to the following:

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Perri Ann Babalis

F. Kevin Bond
Perri Ann Babalis

DRSIBRIEF.HA7