

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 : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

F. Kevin Bond, Perri Ann Babalis; Smith & Hanna, P.C.; attorneys for appellant.

David W. Brown; attorney for appellee.

Recommended Citation

Reply Brief, *Video Publishing Ventures v. Stanley R. Hartmark*, No. 940297 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5959

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

1995

JUN 15

1:00

50

.A10

DOCKET NO. 940297

APPEAL

IN THE COURT OF APPEALS

STATE OF UTAH

VIDEO PUBLISHING VENTURES,
INC., a Colorado corporation,

)

REPLY BRIEF

)

Plaintiff and Appellee,

)

Appeal No. 940297-CA

vs.

)

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

)

)

Defendants and Appellant.

Appeal for the Third District Court, Salt Lake County
Judge Glenn Iwasaki
Argument Priority No. 15Attorneys for Plaintiff
and Appellee,
Video Publishing Ventures,
Inc.Attorneys for Defendant
and Appellant,
Stanley R. HartmarkDAVID W. BROWN
Professional Plaza, Suite 220
2727 West 3500 South
West Valley City, UT 84119F. KEVIN BOND
PERRI ANN BABALIS
SMITH & HANNA
311 South State, Suite 450
Salt Lake City, UT 84111

FILED

JUN 20 1995

COURT OF APPEALS

APPEAL

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.

)

REPLY BRIEF

)

)

Appeal No. 940297-CA

)

)

)

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

Attorneys for Plaintiff
and Appellee,
Video Publishing Ventures,
Inc.

DAVID W. BROWN
Professional Plaza, Suite 220
2727 West 3500 South
West Valley City, UT 84119

Attorneys for Defendant
and Appellant,
Stanley R. Hartmark

F. KEVIN BOND
PERRI ANN BABALIS
SMITH & HANNA
311 South State, Suite 450
Salt Lake City, UT 84111

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
CALENDARING	1
MARSHALING OF EVIDENCE	1
STANDARD OF REVIEW	2
ARGUMENTS	3
 I. THE TRIAL COURT'S RULING THAT THE GENERAL RELEASE WAS UNENFORCEABLE, WAS AN IMPROPER LEGAL CONCLUSION AND NOT SUPPORTED BY ITS FACTUAL FINDINGS	 3
 II. THE TRIAL COURT'S CONCLUSION THAT THE CONSIDERATION GIVEN TO SUPPORT THE RELEASE WAS INADEQUATE IS CONTRARY TO WELL-SETTLED CASE LAW IN UTAH	 7
 III. APPELLEE CANNOT ASK THIS COURT TO MAKE A RULING BASED UPON FACTS THAT THE TRIAL COURT NEVER FOUND	 9
 IV. ECONOMIC DURESS IS NOT A VALID DEFENSE TO A RELEASE OF CLAIMS	 13
 V. THE TRIAL COURT FAILED TO MAKE A FINDING THAT HARTMARK BENEFITTED FROM A CHECK MADE PAYABLE TO SIG SCHREYER FROM VPV	 15
 VI. THE TRIAL COURT ERRED IN FINDING THAT THE \$10,000 CHECK ISSUED TO HARTMARK'S ACCOUNT WAS NOT FOR REIMBURSEMENT OF EXPENSES	 17
 VII. THE TRIAL COURT ERRED IN ITS FINDING OF FAIR MARKET VALUE ON THE PORTABLE TELEPHONE	 19
 VIII. WITHOUT A FINDING THAT A MOTION WAS FRIVOLOUSLY MADE, ATTORNEY'S FEES CANNOT BE AWARDED	 20
 IX. THE TRIAL COURT ERRED IN AWARDING COSTS TO VPV	 22
 X. THE TRIAL COURT'S ORAL FINDINGS ARE INADEQUATE TO SUPPORT ITS RULINGS	 23
 XI. HARTMARK'S REQUEST FOR ATTORNEY FEES IS BASED UPON PRESERVING THE ISSUE FOR APPEAL	 24
 CONCLUSION	 24

TABLE OF AUTHORITIES

UTAH SUPREME COURT CASES

<u>Allen v. Rose Park Pharmacy</u> , 120 Utah 608, 613, 237 P.2d 823, 825 (1951)	8
<u>Buehner Block Co. v. UWC Assocs.</u> , 752 P.2d 892, 895 (Utah 1988)	9
<u>Connell v. Tooele City</u> , 572 P.2d 697 (Utah 1977)	20
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985 (Utah 1988)	20, 21
<u>Girard v. Appleby</u> , 660 P.2d 245, 247 (Utah 1983)	4
<u>Horgan v. Industrial Design Corp.</u> , 657 P.2d 751, 754 (Utah 1982)	13
<u>State v. Emmett</u> , 839 P.2d 781 (Utah 1992)	12

UTAH COURT OF APPEALS CASES

<u>Adams v. Bd. of Review of the Industrial Comm.</u> , 821 P.2d 1 (Utah App. 1991)	23, 24
<u>Asper v. Asper</u> , 753 P.2d 978 (Utah App. 1988)	23
<u>Chevron U.S.A., Inc. v. State Tax Comm'n</u> , 847 P.2d 418, 421 (Utah App. 1993)	4
<u>Henderson v. For-Shor Company</u> , 757 P.2d 485 (Utah App. 1988)	19
<u>Hilton Hotel and Pacific Reliance Insurance v. Industrial Commission of Utah</u> , Case No. 940594-CA (Utah App. 1995)	4
<u>Interwest Construction v. Palmer</u> , 886 P.2d 92 (Utah App. 1994)	3
<u>Jacobs v. Hafen</u> , 875 P.2d 559 (Utah App. 1994)	10
<u>James v. Preston</u> , 746 P.2d 799 (Utah App. 1987)	13
<u>Lloyd's Unlimited v. Nature's Way Marketing, Ltd.</u> , 753 P.2d 507, 512 (Utah App. 1988)	22
<u>Morgan v. Morgan</u> , 795 P.2d 684 (Utah App. 1990)	22
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah App. 1987)	20, 21
<u>State v. Labrum</u> , 881 P.2d 900 (Utah App. 1994)	12
<u>State v. Lovegren</u> , 798 P.2d 767 (Utah App. 1990)	15
<u>Woodward v. Fazzio</u> , 823 P.2d 474 (Utah App. 1991)	2

CALENDARING

Appellee, Video Publishing Ventures, Inc., (hereinafter "VPV"), claims that oral argument and a published opinion is not necessary because the trial court's rulings were fact sensitive and should therefore be summarily affirmed. VPV, however, does not apply the appropriate criteria. The appropriate criteria is whether this court's ruling would contribute to Utah's body of caselaw by making new law.

Whether this court accepts oral argument and issues an published opinion depends on whether this court upholds or reverses the trial court's ruling. Since the trial court departed from established case law at several points in its rulings, in order for this court to uphold the trial court's rulings, this court would need to either depart from or modify existing caselaw. Such a departure or modification would result in new caselaw which would need to be published.

If, on the other hand, this court merely applies existing case law to the basic facts as found by the trial court, it will necessarily reverse the trial court, but may do so without oral argument in an unpublished opinion.

MARSHALING OF EVIDENCE

VPV claims that Appellant's, Stan Hartmark (hereinafter "Hartmark"), entire appeal involves challenges to the trial court's factual findings, and should be dismissed for failure to marshal the evidence. VPV's request is without merit because Hartmark is not challenging basic factual findings which would require

marshaling. The challenges raised by Hartmark involve the trial court's disregard of applicable law or misapplication of the law in reaching its ultimate findings or conclusions. Such issues are legal in nature.

VPV has made the common mistake of confusing the trial court's ultimate conclusions arrived at by applying the law to the basic facts and the trial court's basic findings of fact regarding what actually happened. The marshaling requirement only applies when challenging basic facts. Woodward v. Fazzio, 823 P.2d 474 (Utah App. 1991).

Hartmark is not seeking to overturn the trial court's basic factual findings regarding what happened. Hartmark is seeking review of the trial court's legal conclusions and application of the law to those facts in reaching its ultimate conclusions. Since Hartmark is challenging the trial court's legal conclusions and applications of the law to the facts, not the trial court's findings of basic fact, marshaling is not required, nor would it even prove helpful.

STANDARD OF REVIEW

VPV makes the same mistake involving the appropriate standard of review. VPV erroneously assumes that the trial court's ultimate conclusions, such as its "finding" that there was a lack of a meeting of the minds or a lack of adequate consideration, are basic factual findings to be reviewed using a clearly erroneous standard. Such "findings" are not factual. Rather, they are legal

conclusions in that they are the ultimate conclusion reached by applying the law to the basic underlying facts.

If the trial court misinterpreted or misapplied the law, there is no reason to give it the same deference that is given when the trial court makes factual determinations based on the credibility of the witnesses. The ultimate legal conclusions are based on analysis, not courtroom observations. Consequently, the appellate court is free to correct the trial court's ultimate legal conclusions if the trial court has ignored, misinterpreted, or misapplied the caselaw in reaching such conclusions. Interwest Construction v. Palmer, 886 P.2d 92 (Utah App. 1994).

Since each issue raised by Hartmark involves an erroneous legal ruling or misapplication of the law to the facts, the appropriate standard of review is a correction of error.

VPV's claim that the trial court's ultimate rulings are factual findings deserving deference is a smokescreen to cover the trial court's analytical errors. As each challenge raised by Hartmark is revisited below, the legal mistake or analytical error made by the trial court will be clearly identified so as to confirm that this court is being called upon to correct the trial court's analytical and legal errors, not its basic factual findings.

ARGUMENTS

I. THE TRIAL COURT'S RULING THAT THE GENERAL RELEASE WAS UNENFORCEABLE, WAS AN IMPROPER LEGAL CONCLUSION AND NOT SUPPORTED BY ITS FACTUAL FINDINGS.

The first issue raised by Hartmark is that the trial court erroneously concluded that the general release was unenforceable

because there was no meeting of the minds. The conclusion that there was no "meeting of the minds" is an ultimate legal conclusion. The trial court's analysis in reaching that conclusion in this case is patently flawed.¹

This court recently held in Hilton Hotel and Pacific Reliance Insurance v. Industrial Commission of Utah, Case No. 940594-CA (Utah App. 1995), that a sua sponte ruling from the bench is inappropriate. This court specifically stated:

Raising an issue not addressed by the parties is inappropriate and outside of the discretion given the governing tribunal because it encroaches upon the advocate responsibility conferred upon counsel . . . Furthermore, if a party fails to raise an issue and present evidence regarding the same, it has waived the right to do so . . . Thus, '[t]he interest 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.' Chevron U.S.A., Inc. v. State Tax Comm'n, 847 P.2d 418, 421 (Utah App. 1993) (quoting Girard v. Appleby, 660 P.2d 245, 247 (Utah 1983)).

Hilton, at 6.

This court ruled, within the past two (2) weeks, that it was improper for a trial court to raise and decide an issue sua sponte when it was never expressed or implied by the party as part of the

¹. VPV takes exception to Hartmark's assertion that the trial court raised the meeting of the minds issue sua sponte by citing this court to nineteen pages of transcript. A review of those nineteen pages will show that VPV never raised a "meeting of the minds" challenge. The issue was never addressed until the trial court raised it itself in its ruling. The fact that the trial court dismissed Hartmark's argument sua sponte was inappropriate does not invalidate Hartmark's argument. There is no disputing that the trial court impermissibly raised the meeting of the minds argument on its own initiative.

party's theory of their case. Hilton, at 7. Since this issue was very recently decided by this Court, further discussion on the point would certainly be redundant.

The trial court ruled that there was not a meeting of the minds because the parties took two positions at trial which the court deemed were "different". The court considered the "different" positions to be proof that there was not a meeting of the minds at the time the release was signed. In reality, the trial court was comparing apples and oranges. It was comparing VPV's factual claim with Hartmark's legal argument.

VPV had claimed, and the trial court so found, that VPV signed the release in order to get the company checkbook from Hartmark.² The trial court also found that obtaining the financial records was the "main motivation" for VPV signing the release. The trial court then addressed Hartmark's legal argument that, regardless of VPV's motivation, the release was binding because the mutual releases, in and of themselves, constituted adequate consideration.

The trial court then concluded: "With those two positions it seemed very apparent that there was not a meeting of the minds as

². Whether or not Hartmark demanded the release in exchange for the checkbook was in dispute at trial. No testimony was ever given that Hartmark in fact demanded the release. The only testimony given was hearsay that the attorney, Ron Vance, had told VPV officers that Hartmark wanted a release before he would surrender the financial records.

Despite the sparsity of the evidence, the trial court found that Hartmark had refused to surrender the records until he received a general release. This underlying factual finding is not being challenged, rather, it is being accepted for purposes of argument because even if it is true, it does not, under Utah law, invalidate the general release.

to what was contemplated by the release, what consideration was given."

The trial court's conclusion was a non sequiter. It does not logically follow that there was not a meeting of the minds at the time the release was signed simply because Hartmark subsequently raised a legal argument at trial in order to negate the relevance of VPV's factual claims. Hartmark argued at trial that even if VPV's main motivation in signing the release was to obtain the checkbook, such a motivation did not alter the fact that the parties also gave mutual releases which, in and of themselves, constituted adequate consideration.

In order for the trial court to have correctly held that there was no meeting of the minds, it should have, but did not, base its conclusion on the frame of mind of each party at the time they entered into the agreement.³ The trial court's analysis is, therefore, analytically flawed and should be corrected by this court.

When one considers the frame of mind of each party based on the trial court's underlying factual findings, i.e., that Hartmark demanded the release in exchange for the records, that VPV entered into the release in part to obtain the records, and that Hartmark surrendered the records after obtaining the release, only one

³. Hartmark was arguing that even if VPV's factual claims were true regarding the records, they did not affect the validity of the release because the mutual releases provided the necessary consideration and nothing in VPV's factual claims negated that mutual consideration.

conclusion can be reached: The parties were, in fact, in agreement as to what was contemplated and what consideration was being given.

There is no dispute given the trial court's findings. Both parties expected, as part of entering into the Release Agreement, the transfer of the records and the signing of the general release by the other party. Consequently, there is only one conclusion which may be logically reached based upon the trial court's factual findings: There was, at the time the documents were signed, a meeting of the minds.

Since there is only one logical conclusion, the trial court's illogical conclusion should be corrected by this court. This court should reverse the trial court's ruling that the release was invalid for a failure of a meeting of the minds. To leave the trial court's ruling in place would allow VPV to have the full benefit of the bargain it sought, while denying Hartmark the protection of the release for which he has paid the agreed upon price.

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

The trial court's holding that there was inadequate consideration for the general release is a legal evaluation of the consideration given and is, therefore, subject to correction by this court. The trial court erred in its legal conclusion that the mutual releases were not adequate consideration to make the release enforceable.

The only pertinent underlying facts are: That both parties signed a general release which mutually released the other from any and all claims arising out of Hartmark's employment as an officer of VPV; and that VPV's main motivation in signing the release was to obtain the financial records. Hartmark is not raising any challenge to either of these facts. He is only raising a challenge as to the trial court's legal conclusion as to the impact of the second fact on the first fact.

Hartmark claims that VPV's "main motivation" is legally irrelevant to whether there was consideration given. Even if VPV's main motivation was to obtain the records, it still received Hartmark's binding promise to not bring any legal action against VPV. This is, under Utah law, all that is needed as consideration for VPV's promise not to bring suit against Hartmark. Allen v. Rose Park Pharmacy, 120 Utah 608, 613, 237 P.2d 823, 825 (1951).

The trial court did not cite any legal precedent for its ruling that an ulterior motive negates the express consideration provided in the contract, nor has VPV provided any caselaw to support the trial court.⁴ VPV appears to concede that the mutual promises are adequate consideration, whatever the motivations may have been.

Since, as a matter of law, there was adequate consideration for VPV's release of all claims against Hartmark, regardless of any

⁴. Nor does the trial court justify its violation of the parole evidence rule by looking to evidence outside the contract itself to determine the consideration being given.

ulterior motive, the trial court's contrary ruling must be reversed.

Since there was a meeting of the minds as to what was contemplated and what consideration was given, and since there was adequate consideration given in the form of mutual promises, there is no legal reason that the general release should not have been enforced and VPV's claims dismissed.

III. APPELLEE CANNOT ASK THIS COURT TO MAKE A RULING BASED UPON FACTS THAT THE TRIAL COURT NEVER FOUND.

Recognizing the flawed ruling below, VPV argues that this court should affirm the trial court's ruling that the release was invalid on grounds other than the grounds used by the trial court. In particular, VPV argues that the release should be ruled invalid under theories of duress, fraud, and wrongful concealment.

VPV is asking this court to make rulings the trial court never made based upon facts the trial court never found. Such a request must be denied if the appropriate roles of the trial court and the appellate court are to be preserved.

VPV misconstrues the doctrine that an appellate court may "affirm trial court decisions on any proper ground(s), despite the trial court's having assigned another reason for its ruling." Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988). This doctrine does not extend to allowing the appellate court to

make factual findings on disputed facts which the trial court has not made itself.⁵

The trial court clearly limited its ruling to the legal theories that no contract was ever formed, i.e. failure of the meeting of the minds and lack of adequate consideration. The trial court hinted that it could have invalidated the release on a theory of duress, but refused to do so.⁶ Further, it made no indication that it would have even considered invalidating the release on a theory that Hartmark had schemed to defraud VPV or had wrongfully concealed facts from VPV. For this court to make such rulings for the first time on appeal would be a gross injustice to Hartmark.

In order for this doctrine to be applied in this case, this court must first make basic factual findings which the trial court did not make. It is axiomatic that a trial court's ruling must be supported by factual findings, particularly when the evidence is in dispute. Without such findings, a trial court's ruling must be reversed. Jacobs v. Hafen, 875 P.2d 559 (Utah App. 1994). In this case, not only did the trial court not rule on these theories, it did not make any factual findings that could support such rulings.

⁵. For example, the Supreme Court in Buehner affirmed the trial court's ruling because this court viewed the trial court as having erred in construing the parties' agreement, but concluded that paragraph 9 of the Construction Commitment Letter did not impose a duty on Home, and, therefore, the judgment in favor of Home was affirmed.

⁶. The trial court's hesitance was admittedly caused by the inconsistency of such a ruling with existing Utah caselaw which prevents VPV from claiming economic duress. This legal limitation will be fully discussed in the next section.

All of VPV's theories involved numerous disputed facts. Without basic factual findings by the trial court concerning what happened, including what was said, by whom, to whom, when, etc., there are no factual findings upon which this court could, for the first time, find that Hartmark committed duress, schemed to defraud VPV, or wrongfully concealed facts from VPV.

This is particularly true when one recognizes that a key fact in each of VPV's theories is Hartmark's subjective intent. This court simply cannot make findings about Hartmark's subjective intent from a cold record containing numerous factual disputes. This court cannot determine which of the many versions of the facts it should believe. It has not observed the witnesses, heard the explanations, nor weighed the conflicting testimony.⁷ Nor can this

⁷. VPV has not even gone to the trouble of identifying the elements of its various theories and the pertinent evidence to show that they were proven at trial. Apparently VPV not only wants this court to do the work of the trial court, it also wants this court to do VPV's work. All VPV has done is set out miscellaneous testimony in an attempt to show that Hartmark was a "bad person," and even that is inaccurately portrayed.

On page 14 of Appellee's brief Hartmark states "Hartmark disappeared from the scene and took the checkbooks and financial records with him." Trans. 117-21. The Brief also asserts that Hartmark withheld the records from VPV until it signed a release. There was never any direct evidence that Hartmark in fact had the records or was refusing to surrender them without a release. Hartmark's uncontradicted testimony was that he had left the checkbook and records with various people at VPV, and VPV simply could not find them because they were lost or misplaced. The only evidence that Hartmark was withholding the checkbook until he received a release were hearsay statements made by VPV's attorney Ron Vance to that effect. The conclusion that Hartmark had actually taken the records was pure speculation on the part of the officers of VPV. In fact, contrary to Appellee's assertion that the checkbook "mysteriously appeared," the checkbook and records were retrieved from VPV's attorney's office immediately after the signing, not from Hartmark.

court imply such factual findings, when the trial court has not at least made the ultimate conclusions sought by VPV. State v. Labrum, 881 P.2d 900 (Utah App. 1994).

Furthermore, this court should not imply any factual findings when Hartmark specifically objected to the trial court's lack of adequate findings below, and VPV argued below that the findings were sufficient. VPV must be deemed to have waived any argument that factual findings should now be implied, since it has expressly argued that the findings were adequate.⁸

The representation that the terms of the release were not negotiated is patently false since the release was in fact drafted by VPV's attorney. Inasmuch as VPV's attorney was acting as VPV's agent, it is impossible to say that the terms of the release were not bargained for nor negotiated. At best, VPV may have a claim against its attorney for doing a poor job, but it cannot claim that the job was never done.

Finally, VPV claims, on page 14 of its brief, that the only consideration given for the release was the return of the records which belonged to VPV. Not only is this a legal conclusion instead of a fact, it is erroneous. The mutual releases were also given as consideration.

Even if all of these facts were accepted as true, which they should not be since they were contested and no findings were made by the trial court, they do not require a finding of a scheme to defraud, or wrongful concealment, or duress. Even if Hartmark kept the records until he obtained a release and resigned, such action would be prudent by a financial officer. Hartmark had every right to retain those records until he resigned since he was still the financial officer of VPV. His reluctance to surrender the records before he resigned does not prove ill intent. These "facts" simply do not justify this court invalidating the release on such grounds on its own initiative.

⁸. It would be extremely poor precedent to allow a party to claim at trial that the findings are adequate and then allow the party to ask the Appellate Court to fill in the blanks. VPV's approach amounts to invited error which has consistently been ruled to be a waiver of any defect. State v. Emmett, 839 P.2d 781 (Utah 1992). VPV should therefore be bound to only those findings and conclusions expressly made by the trial court.

Inasmuch as the trial court did not find that Hartmark obtained the release under duress, as part of a scheme to defraud, or following wrongful concealment, the trial court did not even make basic factual findings to support such conclusions. This court should not assume the role of the trial court by making such factual findings and rulings now for the first time on appeal. James v. Preston, 746 P.2d 799 (Utah App. 1987).

IV. ECONOMIC DURESS IS NOT A VALID DEFENSE TO A RELEASE OF CLAIMS.

Even if the trial court had expressly ruled that the release was invalid because of economic duress, such a ruling should be reversed by this court for being contrary to established caselaw. Utah does not recognize economic duress as a defense to a release of claims.

VPV has been less than candid with this court on this point. VPV quotes Horgan v. Industrial Design Corp., 657 P.2d 751, 754 (Utah 1982), for the proposition that "[t]o constitute legal duress, defendant must have acted against his will, and had no other viable alternative." What VPV fails to tell this court is that the Supreme Court in Horgan expressly held that economic duress is not a legal defense to a release of claims in Utah. The Supreme Court stated:

. . . Nor is plaintiff's claimed financial need an adequate defense to the release. 'The mere fact that a contract is entered into under stress or pecuniary necessity is insufficient [to constitute duress]'. . . Many releases are negotiated and signed out of economic necessity: to adopt plaintiff's argument would therefore invite the avoidance of many good faith settlements. Horgan, at 754.

Consequently, even if the trial court had expressly "found" that the release was entered into under duress, such duress would have been purely economic and, therefore, inconsequential as a matter of law. Even if the efforts by Hartmark to protect himself were deemed "duress," as claimed by VPV, since the duress would only be economic, the release would not be rendered unenforceable.

Even if this court were willing to overturn the Supreme Court and allow economic duress to invalidate a release, this would not be the appropriate case. As the Supreme Court noted in its general discussion of duress, a party must have "no other viable alternative." Horgan, at 754. VPV, in this case, had a very simple alternative. It had approximately 10 days, during which time it could have asked a court to order Hartmark to turn over the checkbook, or to order the bank to allow an officer of VPV access to VPV's account so as to order stop-payments on all outstanding checks and to make the necessary payments to keep its doors open.

The facts of this case are quite similar to the facts of Horgan. The plaintiff had entered into a general release, and then, some time later, decided to bring an action in spite of the release. As the Supreme Court noted: "The mere fact of an improvident or bad bargain or a feeling of latent discontent is not a sufficient basis to avoid the effect of an otherwise valid release." Horgan, at 754. In this case, VPV willingly entered into a release because they thought it was the best method to resolve the disputes existing between the parties. Once they got what they wanted, they regretted the business decision they made,

and now seek to renege on their agreement. This court is not here to give VPV relief from the benefit of its own bargain. Id.

V. THE TRIAL COURT FAILED TO MAKE A FINDING THAT HARTMARK BENEFITTED FROM A CHECK MADE PAYABLE TO SIG SCHREYER FROM VPV.

When the trial court ruled that Hartmark had breached his fiduciary duty by writing a check from VPV to Sig Schreyer, the trial court failed to make any factual finding that Hartmark had personally benefitted from such a check. Without a factual finding that Hartmark benefitted from the check, the trial court's conclusion that Hartmark breached his fiduciary duty is not supported by the findings and must be reversed. State v. Lovegren, 798 P.2d 767 (Utah App. 1990).⁹

It appears that VPV is requesting that this court retroactively imply a factual finding of personal benefit. As indicated previously, it would be improper to imply any factual findings in this case, especially when VPV affirmatively argued below that the findings were adequate.

Furthermore, there is no indication in the trial court's ruling that it recognized the necessity of finding a personal benefit before finding a breach of fiduciary duty. In fact, the trial court merely held that the check was "an unauthorized

⁹. This discussion is not needed if this court determines that the settlement between VPV and Schreyer constitutes an accord and satisfaction of the claim for recovery of the \$10,370. Since VPV accepted \$4,000 from Schreyer who actually received the money at issue, the debt should be deemed satisfied in full and any secondary liability of Hartmark forgiven. It appears that since VPV did not even raise an argument on this point in its brief that it has conceded the point. The judgment as it relates to the Schreyer check should therefore be reversed.

transfer of funds." Court's ruling, 6. Simply finding that Hartmark made an unauthorized transfer is not a finding that he did so for personal gain, or that to do so was a breach of a fiduciary duty. At best, it shows that the trial court believed Hartmark made a transfer that he should not have made.

To hold, as the trial court did, that an unauthorized transfer, in and of itself, is a breach of a fiduciary duty, would be to adopt a rule of law so broad that it would cover every good faith mistaken payment. It is clear that some personal gain must be proven before an "unauthorized transfer" will amount to a breach of fiduciary duty. Mere error in judgment is not enough.

In seeking to imply a factual finding of personal benefit, VPV claims that the evidence supporting the court's "factual finding"¹⁰ is overwhelming. VPV then recites a litany of irrelevant facts which do not prove that Hartmark breached his fiduciary duty by personally benefitting from the check to Schreyer. The only possibly relevant "evidence" is an affidavit from Schreyer, who could not appear because of illness, wherein Schreyer states that Hartmark had personally guaranteed repayment of the loan from Schreyer to Echochem. In violation of the "best evidence" rule, no copy of any such personal guaranty was ever presented by VPV. In

¹⁰. Once again, VPV mischaracterizes the trial court's ultimate conclusion as a factual finding. Whether Hartmark breached his fiduciary duty is a legal conclusion made based upon the underlying facts. Hartmark is claiming that the trial court erred in making that conclusion without first finding that Hartmark received a personal benefit from the check. This is not a factual error but a legal error in concluding that a breach of fiduciary duty does not require personal benefit. Consequently, a correction of error standard of review applies.

fact, the note from VPV to Echochem, which was admitted into evidence, clearly indicated that Hartmark signed as an officer of Echochem and not individually. P. Ex. 2.

In contradiction to VPV's assertion of misconduct was the uncontroverted testimony from Hartmark, Gardner (a director of VPV), and Vance (VPV's legal counsel) that Hartmark met with Vance and sought his legal advice before issuing the check, and that Vance authorized the payment since VPV owed money to Echochem. Vance himself indicated that there was nothing illegal about the payment, only that it was sloppy accounting procedure.

Given VPV's waiver of any need for an implied factual finding, and the lack of any indication in the trial court's ruling that it found Hartmark had benefitted personally, the absence of any reliable admissible evidence that Hartmark benefitted personally from the check, and the clear, uncontroverted evidence that the payment was made with the knowledge and consent of VPV's legal counsel, this court should not imply a finding that Hartmark personally benefitted from the check to Schreyer.

Consequently, the court's ruling that Hartmark breached his fiduciary duty must be reversed for lack of adequate findings.

VI. THE TRIAL COURT ERRED IN FINDING THAT THE \$10,000 CHECK ISSUED TO HARTMARK'S ACCOUNT WAS NOT FOR REIMBURSEMENT OF EXPENSES.

The trial court refused to accept Hartmark's claim that the \$10,000 check issued to his California account was for reimbursement of his expenses and compensation for 1988 when setting up VPV. The court stated that there was "no competent evidence" as to the nature of the expenses. If the trial court

made its ruling after concluding that there was no competent evidence as to the nature of expenses, the trial court's ruling is inaccurate and, therefore, erroneous on its face.

Hartmark is not challenging a factual finding that Hartmark was not entitled to the 1988 compensation and reimbursement, because no such factual finding was ever made. Rather, the trial court erroneously stated that since there was no competent evidence as to the nature of the expenses, such expenses must not have been for reimbursement of expenses. Such an error in analysis may be freely corrected by this court.

To the extent the trial court may have intended to say that the evidence was insufficient to persuade the court because it did not show the nature of all of the 1988 expenses, Hartmark did not need to prove every expense so as to total \$10,000. Hartmark only needed to prove the total sum.

The amount owed from VPV to Hartmark had already been agreed upon by the officers of VPV. Hartmark's claims for 1988 reimbursement and compensation had already been presented to VPV, and an accord and satisfaction had been reached regarding those claims. That accord and satisfaction was evidenced by the memorandum setting forth the amounts each officer was to receive.

D. Ex. 22.

Once the accord and satisfaction was reached, all Hartmark needed to prove was the agreed upon amount recorded on the memorandum. Since the memorandum was admitted into evidence, the trial court had sufficient competent evidence to prove that the

amount claimed was, in fact, owed to Hartmark. To hold that Hartmark needed to prove the nature of each expense before he could claim them violated the doctrine of accord and satisfaction, which was a legal error.

VII. THE TRIAL COURT ERRED IN ITS FINDING OF FAIR MARKET VALUE ON THE PORTABLE TELEPHONE.

Whether the trial court applied the appropriate measure of damages for conversion of the portable telephone is a legal question of the proper formula for damages. The case law unequivocally states that the appropriate formula, as a matter of law, is the fair market value at the time of the conversion. If the trial court used a different method of calculating damages, it has made a legal error which this court may correct.

Hartmark is not claiming that the trial court erred in finding a fair market value of \$1,000. That would be a factual challenge. Hartmark is claiming that the trial court erred in not finding the fair market value at all. Martell testified that VPV purchased the telephone for \$1,000, but there was no evidence as to what the telephone was worth at the time of the conversion. The trial court awarded the purchase price, less the value of the phone at the time of trial, contrary to the law.

Since VPV did not provide any evidence as to the fair market value at the time of the conversion, any attempt to set a fair market value would be pure speculation, which is not allowed. Henderson v. For-Shor Company, 757 P.2d 485 (Utah App. 1988). Since VPV had the burden of proving fair market value, and it failed to do so, it failed to prove its damages and, therefore, is

not entitled to damages or a reduction. Connell v. Tooele City, 572 P.2d 697 (Utah 1977).

VIII. WITHOUT A FINDING THAT A MOTION WAS FRIVOLOUSLY MADE, ATTORNEY'S FEES CANNOT BE AWARDED.

In order for the trial court to lawfully award attorney's fees for a frivolous motion, it must first find that the motion was made without merit. O'Brien v. Rush, 744 P.2d 306 (Utah App. 1987). Judge Daniels never made such a finding, nor did Judge Iwasaki. Without such a preliminary finding, the trial court could not find that VPV was entitled to attorneys fees. Without a finding of entitlement to fees, any award of fees is erroneous as a matter of law. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988).

Once again, VPV is seeking an implied finding that the motion was frivolous. As argued before, VPV should not be allowed to salvage the faulty judgment by seeking implied findings, since VPV argued below that the findings were adequate. Furthermore, there is not a sufficient manifestation that either Judge Daniels or Judge Iwasaki ever actually found that the motion was frivolous.

The comment by Judge Daniels that the "request for attorney's fees will be taken under advisement and handled at a later time, depending on the merits of the underlying claim as to whether the corporation was properly authorized to file this suit," shows only that he had not made the requisite finding of frivolity at that time, and would not do so unless Hartmark's claim failed on the merits.

VPV erroneously claims that since Hartmark's motion subsequently failed on the merits, that it is automatically

entitled to attorney's fees under Judge Daniels' statement. The failure of Hartmark's motion, however, was merely a precondition, not the determining factor. Unless the motion failed on the merits, there obviously could not be any claim for attorney's fees. But mere failure of Hartmark's motion is not enough to show that Judge Daniels actually found the motion frivolous, because it does not logically follow that because Hartmark's motion failed, that it was frivolous. O'Brien, 744 P.2d at 309. Since the motion was not decided on the merits until after Judge Daniels had retired, there is no logical way that a finding of frivolity can be implied to him.

Judge Iwasaki gave no indication that he personally had evaluated the motion and determined that it was frivolous. In fact, given VPV's representation to Judge Iwasaki that Judge Daniels had already determined that attorney's fees would be awarded if the motion was unsuccessful, it is unlikely that Judge Iwasaki ever gave the matter any independent thought. There is certainly no indication in the record that Judge Iwasaki personally found the motion to be frivolous.

Since there is no reliable indication that the trial court actually made the requisite finding that the motion was frivolous, no such finding should be implied. Since there is no finding of entitlement necessary to support an award of attorney's fees, the award should be vacated. Dixie State Bank, 764 P.2d at 989.

IX. THE TRIAL COURT ERRED IN AWARDING COSTS TO VPV.

If the trial court awarded costs which are not allowed by law, this would clearly be a legal error which may be corrected by this court. The standard for awarding deposition costs is fairly clear and straight forward. The deposition must be "essential to the development and presentation of the case." Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990). This means that the case must be so complex that discovery cannot be completed through less expensive means. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988).

VPV's only justification of the depositions was that they were necessary to "lock in" the testimony of the main players. VPV does not explain why it needed depositions to "lock in" the testimony of its own witnesses, Martell and Owens. It seems that taking the deposition of one's own witnesses is really not essential to complete discovery. Therefore, at least the costs of the Martell and Owens depositions should have been denied.

Even assuming that "locking in" testimony is a valid goal of discovery, VPV presents absolutely no explanation why requests for admissions or interrogatories would not have adequately "locked in" the testimonies of Hartmark and Gardner. The simple fact of the matter is that VPV wants to shift the hard costs of bringing its own lawsuit onto Hartmark. If the tests set out in Morgan and Lloyd's are to have any meaning, then the award of deposition costs must be reversed.

X. THE TRIAL COURT'S ORAL FINDINGS ARE INADEQUATE TO SUPPORT ITS RULINGS.

Hartmark is not claiming that the trial court erred by not making written findings, although they certainly would have been helpful. Hartmark is claiming that the oral findings made by the trial court are inadequate to support the rulings made.

As is evident from the many questions raised by Hartmark, the trial court did not provide detailed findings in order to set forth the steps of the court's analysis. Adams v. Bd. of Review of the Industrial Comm., 821 P.2d 1 (Utah App. 1991). If it had, many of the issues raised on appeal would not have been raised.

Inasmuch as Hartmark protested the inadequacy of the findings below, and VPV stridently argued that they were sufficient, any deficiency in the findings should now be resolved in favor of Hartmark. Asper v. Asper, 753 P.2d 978 (Utah App. 1988).

No findings should be implied by this court in order to uphold any of the trial court's rulings in favor of VPV. To do so would allow VPV, who drafted the trial court's findings of fact and conclusions of law, to invite error by omitting detailed findings, and then benefit from that error on appeal by claiming that the omitted finding was favorable to its position. Hartmark should not now be penalized for doing all that he could to correct the inadequacy of the trial court's findings in a timely manner.

If the trial court had actually made the requisite subsidiary findings regarding the basic facts which are missing in this case, it may have realized that its initial rulings were wrong.

See Adams v. Bd. of Review of the Industrial Comm., 821 P.2d 1,
(Utah App. 1991).

**XI. HARTMARK'S REQUEST FOR ATTORNEY FEES IS BASED UPON PRESERVING
THE ISSUE FOR APPEAL.**


VPV misconstrues Hartmark's request for attorney's fees.
Hartmark is simply preserving his claim to attorney's fees in the
event he prevails on appeal.

CONCLUSION

The trial court misconstrued and misapplied the law to the
facts of this case when it ruled that the general release was
invalid. The entire judgment should, therefore, be reversed, and
the matter returned to the trial court for consideration of
attorney's fees, both below and on appeal. In the alternative,
each award should be reversed for the respective reasons set forth
herein.

RESPECTFULLY SUBMITTED this 20 day of June, 1995.

SMITH & HANNA

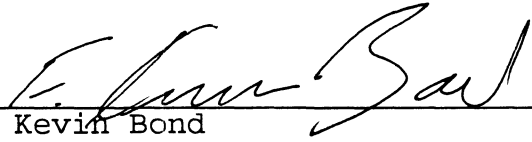
A handwritten signature in cursive script, appearing to read "F. Kevin Bond", written over a horizontal line.

F. Kevin Bond
Perri Ann Babalis

CERTIFICATE OF MAILING

I hereby certify on the 20 day of June, 1995, a true and correct copy of the foregoing REPLY BRIEF was mailed, postage prepaid, to the following:

David W. Brown
Professional Plaza, Suite 220
2727 West 3500 South
West Valley City, UT 84119



F. Kevin Bond
Perri Ann Babalis

PABIRPLYBRIEF.HA7