

1994

# Lan C. England v. Eugene Horbach, an individual, Mediocode, Incorporated, a Utah corporation, and Does I through V: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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## **JURISDICTION**

The Court of Appeals has jurisdiction over this timely appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) and Rule 4 of the Utah Rules of Appellate Procedure. *See* Addendum ("Add") 1.

### **ISSUES FOR REVIEW AND STANDARDS OF REVIEW.**

- I. Did the district court err in concluding that the 2% agreement did not constitute an accord and satisfaction of Eugene Horbach ("Defendant") and Lan England's ("Plaintiff") original agreement? Whether an accord and satisfaction exists presents a mixed question of law and fact. The court reviews underlying factual conclusions for clear error, and the application of the law to the facts under the correction of error standard. *See Herm Hughes & Sons, Inc. v. Quintek*, 834 P.2d 582, 583 (Utah Ct. App. 1992).
- II. Did the district court err in concluding that there was no consideration for Defendant's promise to hold 2% of the stock of Medicode, Inc. in trust for Plaintiff because the parties were mutually mistaken as to whether any amount was due Plaintiff? Whether there is consideration is a mixed question of law and fact. The court reviews underlying factual conclusions for clear error, and the application of the law to the facts under the correction of error standard. *See State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993).
- III. Should the Defendant be estopped from denying his promise to hold 2% of the stock for Plaintiff? This question presents a mixed question of law and fact. *See Thurman*, 846 P.2d at 1269.

IV. Did the district court err in permitting Defendant to amend the pleadings to include a counterclaim at the close of evidence at trial? The standard of review on this issue is abuse of discretion. *See Westley v. Farmer's Ins. Exchange*, 663 P.2d 93, 94 (Utah 1983).

#### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

The following rule is pertinent to this appeal:

. . . [A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 15(a) U.R.C.P.

#### **STATEMENT OF THE CASE**

Plaintiff brought an action for breach of contract against the Defendant. Plaintiff alleged that Defendant had failed to transfer 2% of the stock of Medicode, Inc. to Plaintiff on demand as promised to conclude a stock purchase between the parties. *See* Record ("R.") 2-17; Add. 2-17. (Citations to "R" are citations to the original record; the "Add." cites refer to the page numbers of the Addendum.) At the end of trial, the Defendant moved to amend the pleadings to conform to the evidence not specifically mentioning a counterclaim against the Plaintiff for alleged overpayments on the underlying stock purchase contract. The Court ruled no cause of action on Plaintiff's complaint and awarded Defendant \$169,501.75 on the counterclaim. Plaintiff appeals.

#### **STATEMENT OF FACTS**

In late 1989 or early 1990, Defendant and Plaintiff reached an agreement whereby Defendant agreed to purchase 258,363 shares of Medicode stock from Plaintiff. (R. 488 lines 15,



489 lines 1-6, 490; Add. 56-58). The parties agreed that the purchase price for the shares was \$2.75 per share or \$710,498.25. (R. 256, ¶ 4, 488-89, 531; Add. 42, 56-57, 74). Plaintiff testified, and Defendant did not dispute, that the purchase money was to be paid within two to three months during the first quarter of 1990. (R. 490-91, 494, 506 line 25-507 line 5, 368-69; Add. 58-59, 62, 65-66, 74, 48-49). Over the next several months the Defendant made payments, but he failed to pay Plaintiff the purchase money within the time frame agreed. *Id.* Indeed, the testimony at trial indicated that payments were received through at least September 1990. (R. 256, ¶¶ 6-7; Add. 42). In May of 1991, Plaintiff and Defendant met to come to an agreement with respect to wrapping up the deal. (*Id.* at ¶ 10, R. 505-507, 372-73; Add. 64-66, 50-51, 42). Plaintiff still had possession of the stock and believed, in good faith, that Defendant owed him \$25,000.00. (R. 505-06, 517-18; Add. 64-65, 71-72). He also believed that Defendant had breached their original agreement by failing to pay for the stock within the period agreed. (R. 491-494, 504-07, 256 ¶ 11, 368-69, 373, 382-83; Add. 59-62, 63-66, 42, 48-49, 51, 52-53). At the May meeting, Plaintiff and Defendant reached an agreement whereby Defendant agreed to pay Plaintiff an additional \$25,000.00 and hold 2% of the stock of Medicode in trust for Plaintiff. (R. 15, 257-58, ¶ 12, 505-08; Add. 15, 43-44, 64-67). Plaintiff on the other hand, agreed to transfer the stock to Defendant immediately and gave up his rights to sue for breach of the original agreement. (R. 382-84, 517-19; Add. 52-54, 71-73). Both Plaintiff and Defendant agreed that Plaintiff would not have transferred the stock to Defendant if Defendant had not agreed to pay an additional \$25,000.00 and hold 2% of the stock for Plaintiff. (R. 584-85, 590; Add. 78-80). Moreover, both

parties testified that they both believed money was still owing under the original contract. (R. 577, 584; Add. 77-78).

In December 1992, Plaintiff made a demand for the 2% of Medicode stock. (R. 16-17, 512-13; Add. 16-17, 68-69). Defendant refused to honor the May 1991 agreement. R. 513-14; Add. 69-70. Despite the fact that Defendant admitted to executing the agreement (R. 584 lines 8-14; Add. 78), and the fact that the agreement states unequivocally that Defendant will hold 2% of the stock for Plaintiff, (R. 15; Add. 15), the district court ruled that Plaintiff could not enforce the agreement because no consideration supported it. (R. 438-42; Add. 85-89). The court held that at the time of the agreement the parties were under a mutual mistake that money was still owed on the original agreement. *Id.* The court dismissed Plaintiff's claim. The court committed legal error in dismissing Plaintiff's claim.

Adding insult to injury, the court also ruled that Defendant had overpaid the Plaintiff in the amount of \$169,501.75 for the stock and allowed Defendant to recover the money on a counterclaim that was raised during trial. The parties disputed the purpose for several of the payments from Defendant to Plaintiff. Plaintiff claimed that the amounts were for services rendered and were paid in connection with other deals that the parties had entered previously. The court found Plaintiff's claim for approximately \$169,501.75 in services was incredible because no documentation supported it. This, despite the fact that Plaintiff and Defendant had no documentation to support the original stock purchase transaction of \$700,000.00. Moreover, Plaintiff was not given ample, if any, opportunity to prepare his case on the overpayments due to Defendant's lack of diligence in "discovering" the evidence. Plaintiff has, since trial, located

documentary evidence that would substantiate his claims regarding the purpose for the disputed payments. Plaintiff was not able to locate this evidence prior to trial because Plaintiff failed to raise the prospect of a counterclaim or the defense of full payment until just prior to trial.

Plaintiff filed a complaint against Defendant on March 15, 1993. (R. 2-17; Add. 2-17). Plaintiff requested a jury trial in his complaint. *Id.* Defendant filed an answer on April 30, 1993. (R. 35-39; Add. 18-22). Defendant raised several defenses in his answer but never mentioned mutual mistake or lack of consideration as defenses. *Id.* Moreover, absolutely no mention was made of any potential counterclaim or off-set. *Id.* After several months, the court set a trial date in this matter for December 21, 1993. (R. 168; Add. 23). One week before trial, on December 14, 1993, Defendant filed a motion for a continuance of the trial date and for leave to file a counterclaim, claiming that he had discovered new evidence and needed time to develop the evidence. (R. 184-188; Add. 24-28). Defendant argued that the "new" evidence may give rise to a counterclaim. (R. 186; Add. 26). The court denied the motion because failure to discover the evidence earlier was due to lack of diligence on Defendant's part. (R. 199, 193-97; Add. 34, 29-33) (court indicated that the motion was denied for the reasons set forth in Plaintiff's brief in opposition, and Plaintiff argued that the failure to discover the evidence was due to lack of diligence on Defendant's part). Later, because a conflict arose in the court's schedule, the court postponed the trial until March 23, 1994. (R. 204; Add. 35). At or about the time that Defendant asked for the continuance, he argued for the first time, but never in formal pleadings, that he had paid Plaintiff in full under their original agreement. In his motion for a continuance, Defendant also asked the court for leave to amend his answer to include a counterclaim, and the court denied

the request. (R. 199; Add. 34). Due to the postponement of the trial, Plaintiff was made aware that Defendant intended to introduce evidence that he had paid Plaintiff in full in defense of Plaintiff's claim, and Plaintiff did not object to the defense being raised.

As the March 23rd trial date neared, once again Defendant began to "discover" new evidence. Defendant now claimed that he had recently discovered records revealing that he had substantially overpaid Plaintiff. Plaintiff maintained that the payments were related to other deals between the parties. Still Defendant indicated that he intended to introduce evidence of overpayment in response to Plaintiff's claim, but gave no indication that he intended to pursue a counterclaim to recover amounts allegedly overpaid.<sup>1</sup> Defendant filed a trial brief on March 22, 1994, the day before trial in this matter, in which he raised for the first time since the court's denial of his motion for a continuance and leave to file a counterclaim, any intention of pursuing a counterclaim to recover the alleged overpayments. (R. 229 & n. ¶ 13; Add. 38). Plaintiff filed a trial brief the day of trial, which did not address Defendant's counterclaim or any defenses thereto because Plaintiff did not know that Defendant intended to pursue a counterclaim until the day of trial when Defendant handed Plaintiff the trial brief.<sup>2</sup> (R. 232-39; Add., 890-97). The

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<sup>1</sup> At the final pretrial conference, Horbach's attorneys indicated that he intended to introduce evidence of overpayment but gave no indication that they intended to bring a counterclaim to recover the alleged overpayments. England believed that the evidence would be introduced to support Horbach's defense of lack of consideration for the substitute agreement.

<sup>2</sup> Plaintiff was aware that Defendant intended to defend against the Plaintiff's claim by introducing evidence of overpayment and claiming thereby that he had paid the full purchase price of the stock prior to the execution of the substitute agreement and that no consideration supported the agreement. However, Plaintiff had absolutely no notice that Horbach intended to pursue a counterclaim to recover amounts allegedly overpaid. Horbach had given some indication in the weeks prior to the first trial date that he believed that he had overpaid England \$25,000.00. He asked for leave to file a counterclaim at that time which was denied. R. 199. No further mention

court will note that Plaintiff's Trial Brief addresses the law on all the issues before the Court, but does not mention any counterclaim.

Defendant admits that he raised his counterclaim for the first time in his trial brief and when he asked the court to amend the pleadings to conform to the evidence at the close of the trial. *See* Memorandum of Points and Authorities in Support of Appellee's Motion for Summary Disposition, at p. 3; Add. 83-84. Plaintiff did not consent to the amendment of the pleadings to include a counterclaim. Plaintiff was surprised and prejudiced by the court's allowing Defendant to pursue a counterclaim at trial. Despite the fact that Plaintiff had never been put on notice that Defendant intended to pursue a counterclaim, the court permitted Defendant's requested amendment at the close of evidence and awarded the Defendant \$169,501.75 on the counterclaim. The court abused its discretion in allowing the counterclaim to be brought.

#### SUMMARY OF ARGUMENT

The Court erred in concluding that because the parties were mistaken about the amount and whether money was due Plaintiff that no consideration supported the May 23, 1991 agreement. Courts have held that settlement of a bona fide dispute is consideration, even if the dispute is not well-founded.

At the May 23, 1991 meeting, Plaintiff believed in good faith that he was still owed money and that defendant had failed to pay for the stock as agreed. Defendant wanted to secure

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was made of a counterclaim until Horbach filed his trial brief the day before trial. The week of trial Horbach indicated that "new evidence" revealed that the amount he had overpaid England was \$300,000.00. At trial, Horbach recovered about \$170,000.00 on his counterclaim. Plaintiff was barely given an opportunity to hear of Defendant's claims before trial much less an opportunity to prepare to meet them.

immediate delivery of the stock. Accordingly, the parties entered an accord and satisfaction in which Defendant agreed to pay \$25,000.00 and hold 2% of the Medicode stock in trust for Plaintiff, and Plaintiff agreed to immediate delivery of the stock and gave up his rights to rescind or sue for breach. The fact that Plaintiff's belief may have been mistaken does not mean that no consideration supported Defendant's promise. Defendant's promise was supported by consideration and should be enforced.

Even if the Court were to conclude that no consideration supported Defendant's promise, the Court should rule that Defendant is estopped from denying it. Defendant made a promise to induce action on Plaintiff's part; Plaintiff reasonably relied on the promise, to his detriment. Defendant got what he wanted from his promise--the immediately delivery of the stock--and should be forced to honor his promise.

Finally, the trial court abused its discretion by amending the pleadings to include a counterclaim raised at trial. While amendment of the pleadings are generally liberally permitted, amendments to include new or different causes of action are highly disfavored. Defendant gave no good reason for failing to bring the counterclaim earlier, and Plaintiff, surprised and prejudiced by the claim, was given no time to prepare to meet it, and did not consent to it. Accordingly, the court abused its discretion by permitting the Defendant to pursue a counterclaim.

### ARGUMENT

The questions of whether there was consideration for the May 1991 agreement, and whether the parties entered into an accord and satisfaction present mixed questions of law and fact. The court must accept the findings of fact unless clearly erroneous, but reviews the application of the law to the facts for legal error. *See State v. Thurman*, 846 P.2d 1256, 1269

(Utah 1993); *Herm Hughes & Sons, Inc. v. Quintek*, 834 P.2d 582, 583 (Utah Ct. App. 1992).

The facts of this case reveal that the trial court erred in concluding that there was no accord and satisfaction because there was no consideration to support the May 1991 agreement.

I. BECAUSE CONSIDERATION SUPPORTED DEFENDANT'S PROMISE, THE COURT SHOULD HAVE FOUND AN ACCORD AND SATISFACTION.

"An accord and satisfaction arises when the parties to a contract mutually agree that a performance different than that required by the original contract will be made in substitution of the performance originally agreed upon and that the substituted agreement calling for a different performance will discharge the obligation created under the original agreement." *Neiderhauser Builders v. Campbell*, 824 P.2d 1193, 1197 (Utah App. 1992). Compromise of a bona fide dispute, even though not well-founded or based on a mistaken assumption can constitute consideration for an accord and satisfaction. *In re Grimm*, 784 P.2d 1238, 1244 (Utah App. 1989). "Where the underlying claim is disputed or uncertain, the obligors assent to the definite statement of performance in the accord amounts to sufficient consideration." *Sugarhouse Finance Co. v. Anderson*, 610 P.2d 1369, 1372 (Utah 1980). The Utah Supreme Court has also expressly recognized the "modern trend among courts . . . to uphold such agreements [accords and satisfactions] wherever possible." *Id.* "[C]onsideration is often found in the obligor's agreement to alter the means or method of payment of the obligation initially owed." *Id.* That is precisely what occurred in this case. Here, the parties entered into an accord and satisfaction.

It is undisputed that Defendant and Plaintiff initially agreed that Defendant would pay \$2.75 per share for Plaintiff's shares of Medicode stock. (R. 256, ¶ 4; Add. 42). Plaintiff's undisputed testimony was that the purchase money was to be paid in the first two to three months

of 1990. (R. 490-91, 494, 506-07, 368-69; Add. 58-59, 62, 65-66, 48-49). The money was not paid as agreed. (R. 494, 368-69; Add. 62, 48-49). In May 1991, Plaintiff and Defendant met to wrap up the stock sale. At that meeting, the parties changed the agreed-upon performance. Defendant agreed to pay \$25,000.00 and give Plaintiff 2% of the stock of the company in exchange for Plaintiff's agreement immediately to transfer the 250 thousand plus shares of Medicode stock. Plaintiff performed his part of this executory accord, Defendant has refused to do so.

At the May 1991 meeting, Plaintiff believed that Defendant owed him \$25,000.00 and that Defendant had failed to pay him within the first quarter of 1990 as agreed. Thus, Plaintiff believed in good faith that he had no obligation to turn the stock over to Defendant and maintained that Defendant had no right to immediate possession of the stock. Defendant, however, wanted the stock immediately. (R. 584; Add. 78). Accordingly, he entered into an agreement to pay Plaintiff \$25,000.00 and hold 2% of Medicode stock in trust for Plaintiff. (R. 15, 590; Add. 15, 80). He knew that he could not get the stock unless he agreed to pay \$25,000.00 and hold 2% of the stock. (R. 590; Add. 80). This agreement constitutes an accord and satisfaction, which replaced the parties' original agreement. Notwithstanding the facts, the trial court ruled that no consideration supported the accord and satisfaction because the parties were mutually mistaken with respect to the fact that Defendant still owed Plaintiff money. However, the fact that Plaintiff's belief was wrong does not vitiate the consideration in this case. A compromise of a bona fide dispute, even if not well-founded, constitutes consideration. The district court erred in concluding otherwise.



II. THE DISTRICT COURT ERRED IN CONCLUDING THAT NO CONSIDERATION SUPPORTED THE SUBSTITUTE AGREEMENT AND THAT THE PARTIES DID NOT ENTER AN ACCORD AND SATISFACTION.

The fact that Defendant may not have actually owed Plaintiff money<sup>3</sup> does not mean there was no consideration. "The Supreme Court of Utah has stated in several cases that consideration . . . may consist of a compromise of a *bona fide* dispute which is not necessarily well-founded but is in good faith." *In re Grimm*, 784 P.2d at 1244 (citing *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730 (Utah 1985); *Sugarhouse*, 610 P.2d at 1372; *Ashton v. Skeen*, 85 Utah 489, 39 P.2d 1073 (1935)). Thus, although a party may be mistaken about his position, when he gives up rights or compromises a bona fide dispute in good faith, consideration exists for the agreement reached in settlement of the dispute.

The decision of the Utah Supreme Court in *Golden Key Realty, Inc.* is instructive. There, the plaintiff real estate broker sued for \$18,000.00 allegedly due in commission from defendant. Defendant claimed that the parties had entered an accord and satisfaction and plaintiff had accepted \$5,000.00. The plaintiff argued that there was no consideration for the accord and satisfaction. The court rejected the argument, declaring "where there is a bona fide dispute as to the amount due, sufficient consideration exists. It is not necessary for the dispute to be well founded, so long as it is in good faith." 699 P.2d at 733; *see also Farmers & Merchants State Bank v. Higgins*, 89 P.2d 916 (Kan. 1939) (the court held that extending time of payments was consideration for giving of a mortgage); *Long v. Forbes*, 136 P.2d 242, 246-47 (Wyo. 1943) ("the

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<sup>3</sup> Plaintiff vigorously disputes that he was not owed money at the time of the meeting. Plaintiff also disputes that he was overpaid by Defendant. However, these findings of fact are not disputed on appeal.

doing of anything beyond what one is already bound to do, though of the same kind, and in the same transaction may be a good consideration"); *Safety Fed. Sav. & Loan Ass'n v. Thurston*, 648 P.2d 267, 270 (Kan. Ct. App. 1982) ("[i]t has long been held that . . . to do an act which one is not legally bound to perform, is usually a sufficient consideration for a contract based thereon . . ."); *Gorgoza, Inc. v. Utah State Road Comm'n*, 553 P.2d 413 (Utah 1976), ("[i]f one party asks for and receives something which he would not otherwise be entitled to from the other, that is adequate consideration"); *Powers Restaurants, Inc. v. Garrison*, 465 P.2d 761, 763 (Okla. 1970) ("any benefit to the promisor or detriment to the promisee" constitutes consideration).

The evidence here establishes that Plaintiff settled a bona fide dispute, gave up rights that he believed he had, extended the time for payment, and did acts and conferred benefits which he did not believe he was legally bound to do. When the May 1991 agreement was executed, Plaintiff believed in good faith that Defendant owed him \$25,000.00. (R. 505-07, 518-19, 532, 574; Add. 64-66, 72-73, 75-76). Moreover, Plaintiff testified, and Defendant did not dispute in any way, that he was to have been paid the stock purchase money within the first few months of 1990. (R. 490-91, 494, 506 line 25-507 line 5; Add. 58-59, 62, 65-66). The evidence clearly established that payments for the stock were not completed in the first few months of 1990. (R. 493-94, 506-07, 382-83; Add. 61-62, 65-66, 52-53). Indeed, the testimony showed that the payments continued until at least September, 1990. (R. 257, ¶ 4; Add. 43). Thus, when the parties met, Plaintiff believed, in good faith, that he had absolutely no obligation to sign the stock over to Defendant and that Defendant had breached the agreement by failing to pay as agreed. Indeed, Plaintiff believed that he had a right to rescind the agreement. (R. 368-69, 382; Add. 48-49, 52).

Plaintiff testified that he would not have turned over the stock if Defendant had not given him \$25,000.00 and agreed to hold 2% of the stock for him. (R. 518-519; Add. 72-73). Defendant concurred that the stock would not have been transferred without his agreeing to pay \$25,000.00 and executing the 2% note. (R. 590; Add. 80). Nonetheless, Plaintiff agreed to and did sign over the stock at the May 1991 meeting because Defendant agreed to pay \$25,000.00 and hold 2% of the stock in trust for Plaintiff. *Id.* Thus, Plaintiff settled a bona fide dispute regarding the wrapping up of the sale of the stock. He agreed to accept 2% of the stock and \$25,000.00 in settlement of Defendant's late payments. Moreover, he believed he was still owed money. By turning over the stock, he agreed to forego an action for breach based on late payments and did something he believed he had no duty to do. Because Plaintiff believed in good faith that he did not have to turn over the stock and that Defendant had breached the agreement, his agreement to do so constituted consideration even if his belief was mistaken. See *In re Grimm*, 784 P.2d at 1244 (consideration may consist of a compromise of a bona fide dispute which is not necessarily well-founded but is in good faith). By surrendering the stock, which he did not believe in good faith that he had to do, in exchange for Defendant's promise to pay him \$25,000.00 and hold 2% of the stock in trust for Plaintiff, Plaintiff settled a dispute and gave consideration for Defendant's promise. Defendant received a "definite statement of performance" on a disputed or uncertain claim; the Utah Supreme Court has held that is consideration. *Sugarhouse*, 610 P.2d at 1372.

Defendant testified that the 2% agreement was merely security for the \$25,000.00 check he gave Plaintiff on May 23, 1991. However, this testimony directly contradicts the writing, and the trial court should have barred the introduction of the evidence under the parole evidence

rule as Plaintiff requested. See *E.A. Strout Western Realty Agency, Inc. v. Broderick*, 522 P.2d 144, 146-47 (Utah 1974) ("parole evidence may not be given to change terms of a written agreement . . ."); see also R. 597 (Plaintiff's objection to Defendant's testimony). More importantly, the court did not find that the 2% agreement was merely a security agreement. Here, Defendant's testimony directly contradicted the writing and should not have been received. Contrary to the lower court's conclusion, even if Plaintiff was not owed money, there was consideration. Thus, there was consideration to support the May 1991 agreement, and the agreement was enforceable.

III. EVEN IF NO CONSIDERATION SUPPORTED THE AGREEMENT,  
DEFENDANT SHOULD HAVE BEEN ESTOPPED FROM REFUSING TO  
HONOR THE AGREEMENT.

Even assuming that no consideration supports Defendant's promise, it is enforceable under the doctrine of promissory estoppel. In *Glitsos v. Kadish*, 418 P.2d 129 (Ct. App. Ariz. 1966), the court stated that even where a party has not given "consideration" a promise may be enforced under the doctrine of estoppel. Indeed, the court applied the doctrine of promissory estoppel to enforce a promise that was not supported by consideration. The Utah Supreme Court has also declared that the doctrine of promissory estoppel applies to enforce a promise in the context of an accord and satisfaction that is not supported by consideration. *Sugarhouse*, 610 P.2d at 1373. The *Sugarhouse* court pointed to promissory estoppel as an alternative ground for enforcing an accord and satisfaction challenged on the grounds that no consideration supported a party's promise. In Utah, the elements of promissory estoppel are: (1) a promise reasonably expected to induce reliance, (2) reasonable reliance inducing action or forbearance on the part of the promisee

or a third person; and (3) detriment to the promisee or a third person. *Id.*; *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171 (Utah App. 1993).

Here, the elements are satisfied. First, Defendant promised in the May 1991 agreement to pay Plaintiff \$25,000.00 and hold 2% of the stock in trust for Plaintiff. Second, Plaintiff relied on this promise by signing over the stock at the meeting in which the agreement was reached and not bringing claims against Defendant for his initial breach. Plaintiff testified that he would not have signed over the stock without the agreement. (R. 518-519; Add. 72-73). Defendant likewise admitted that he would not have received the immediate delivery of the stock without making the promise to Plaintiff. (R. 590; Add. 80). Plaintiff believed that Defendant still owed him money and that he had failed to pay in the agreed time frame. Third, Plaintiff suffered detriment in that he gave up the stock and the right to sue for breach based on late payments. Accordingly, even if there is no consideration, Defendant should be estopped from refusing to honor his promise to pay \$25,000.00 and hold 2% of the stock for Plaintiff. Defendant got what he wanted from his promise and should be compelled to honor it.

#### IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN PERMITTING DEFENDANT TO PURSUE A COUNTERCLAIM RAISED FOR THE FIRST TIME ON THE EVE OF TRIAL.

Generally, a trial court's decision to grant a motion to amend the pleadings is a matter within the discretion of the trial court, and appellate courts will not disturb such a decision unless an appellant establishes an abuse of discretion resulting in prejudice. *Chadwick v. Nielsen*, 763 P.2d 817, 820 (Utah App. 1988); *see also Girard v. Appleby*, 660 P.2d 245, 248 (Utah 1983). Utah courts have clearly indicated, however, that motions to amend the pleadings

to include new or different causes of actions on the eve of trial are highly disfavored. *Girard*, 660 P.2d at 248; *Alpine Credit Union v. Moeller*, 656 P.2d 988, 989 (Utah 1982) (upholding lower court's refusal to permit a defendant to amend the pleadings based on matters allegedly discovered the day before trial). Here, Defendant moved to amend the pleadings to include a counterclaim only at the end of trial and the motion clearly prejudiced Plaintiff. Thus, the court abused its discretion, and this court should reverse the decision.

The Utah Supreme Court has indicated that a party seeking to amend a pleading on the morning of trial must give an adequate reason for the motion's untimeliness, or it will be denied. *See Girard*, 660 P.2d at 248. Courts have frowned on amendments to the pleadings on the eve of trial because it "causes great disruption to the legal process and is unfair to an opponent who has conducted discovery, fully prepared the case, and scheduled trial based on the moving party's prior pleadings." *See Chadwick*, 763 P.2d at 820. Indeed, the *Chadwick* court declared that while "leave to amend is liberally allowed in the interest of justice, ... justice is often uninterested in amendments alleging new and different causes of action on the eve of trial." *Id.* Here, the court should find that the district court abused its discretion in permitting Defendant to amend the pleadings to include a counterclaim on the day of trial for three reasons, each of which is sufficient in and of itself to require reversal: (1) Defendant has failed to give a reasonable explanation for failure timely to bring the counterclaim earlier; (2) Plaintiff was surprised and prejudiced by the court's allowing Defendant to amend the pleadings, and (3) Plaintiff did not consent to Defendant's pursuing a counterclaim.

A. Defendant Has No Reasonable Excuse for Failure to Amend the Pleadings to Include a Counterclaim Before the Day of Trial.

The Utah Supreme Court has clearly held that a motion to amend the pleadings on the eve of trial will not be granted unless the moving party can give an adequate reason for the untimeliness of the motion. *Girard*, 660 P.2d at 248.<sup>4</sup> Here, Defendant has failed to give an adequate reason for failing to bring the motion in a timely fashion. Defendant attempted to explain the delay in bringing a motion to amend the pleadings by stating that he did not have the records on which he bases his counterclaim until just before trial because a former employee had "squirreled them away." (R. 450-51). In other words, Defendant had access to and control of the records that eventually supported his defense to Plaintiff's claim and his own counterclaim at all times relevant to this proceeding. The trial court refused to allow Defendant leave to amend to file a counterclaim three months earlier for the exact same reason, but then inexplicably allowed the counterclaim based on a motion at the end of trial. (R. 199, 193-97; Add. 29-34). This, despite the fact that Defendant did absolutely nothing in the interim to pursue the counterclaim or inform Plaintiff or the court of the counterclaim prior to the day of trial. Plaintiff did not keep any critical information from Defendant. Rather, Defendant did not make adequate, if any, effort to located the alleged "new" evidence until just prior to trial.

Were the court to find that Defendant's reason for failing to raise the counterclaim sooner was adequate, it would create a dangerous precedent and defeat the purposes of discovery. Parties could conceal critical documents and information and claims and defenses based thereon until just

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<sup>4</sup> The *Girard* court stated that the moving party's "inability to state an adequate reason for the untimeliness of the motion discloses that this is not a case where 'justice requires' an amendment." 660 P.2d at 248.

prior to trial. Then, as here, the party could claim that they just "discovered" the information and based on the "new" information need to amend the pleadings to bring new claims and defenses. The court should reverse the lower court's ruling and firmly establish that a party's lack of diligence in discovering or deliberate efforts to conceal evidence will not be rewarded by the court's permitting last minute amendments to the pleadings.

**B. Plaintiff Was Surprised and Prejudiced by the Court's Permitting the Amendment.**

Plaintiff was prejudiced by the court's allowing the amendment in several important respects. First, Plaintiff made several strategical decisions that may have been affected by the existence of a counterclaim. Before he was aware that Defendant intended to pursue a counterclaim, Plaintiff waived his right to have the case tried to a jury instead of a judge. (R. 181). Plaintiff may well have stuck by his demand for a jury trial had he known that he faced a counterclaim. Second, Plaintiff was not allowed to brief and argue to the court legal defenses such as waiver and estoppel to Defendant's counterclaim. Third, Plaintiff was given absolutely no opportunity to prepare to respond to a counterclaim, as he was notified of Defendant's intention to pursue the claim only at trial. Plaintiff was wholly unaware that the evidence of overpayment would be introduced to support a counterclaim. Fourth, the records which were introduced at trial to support the defense of payment and Defendant's counterclaim were in Defendant's custody and control at all times. Coincidentally, Defendant "discovered" important documents relating to claims and defenses on the eve of both the first trial date and the second trial date. In short, Plaintiff was given no time much less adequate time to prepare a defense to Defendant's claims that all of the payments were for stock.



C. Plaintiff Did Not Consent to the Amendment of the Pleadings by Allowing in the Evidence Relating to Overpayment.

Plaintiff did not consent or impliedly consent to the amendment of the pleadings by allowing the evidence of overpayment in without an objection. Plaintiff acknowledges that no objection was raised at trial when evidence going to overpayment was introduced. Plaintiff did not feel that such an objection was justified because Plaintiff knew that Defendant intended to introduce such evidence in defense of Plaintiff's claim. Plaintiff's assumption was reasonable in light of the fact that the court had expressly denied a motion for leave to file a counterclaim. The parties disputed the characterization of several payments from Defendant and companies he owned to Plaintiff. Defendant argued that all payments were for stock while Plaintiff disagreed. Plaintiff thought this evidence was to be introduced to prove Defendant's defense that payment had been made and no consideration existed for the May, 1991 agreement. This was a reasonable assumption; three months previous, the court had expressly refused to grant Defendant leave to file a counterclaim. (R. 199; Add. 34). Following that refusal, no motion was ever made, prior to the close of evidence, to bring a counterclaim. Thus, Plaintiff and his counsel did not believe that the evidence was being received for such a purpose. Even the motion at the close of evidence did not specify that Defendant sought permission to pursue a counterclaim. (R. 598; Add. 82). Certainly, Defendant's trial brief mentions that he intends to pursue a counterclaim, but it does not constitute a motion to amend the pleadings. Further, the trial brief was served on Plaintiff the day of trial. The only motion to amend the pleadings came at the close of trial and did not mention a counterclaim.

The California Supreme Court has decided a case on strikingly similar facts that can guide the court here. In *Trafton v. Youngblood*, 442 P.2d 648 (Cal. 1968), the plaintiff sued the defendant to recover money received in trust by the defendant for the plaintiff. The defendant had kept the money claiming that the plaintiff owed him the money. Defendant had pleaded "an account stated" as an affirmative defense. The evidence supporting the defense of an account stated also supported a counterclaim against the plaintiff, but the defendant had failed to plead a counterclaim. After trial, the defendant asked the court for leave to amend his answer to include a counterclaim, but the court denied the motion. *Id.* at 652-53. Defendant argued that the court erred in denying the motion. The California Supreme Court affirmed the lower court's denial, stating:

[A]mendments have been allowed with great liberality "and no abuse of discretion is shown *unless by permitting the amendment new and substantially different issues are introduced into the case or the rights of the adverse party prejudiced.* . . .

...

It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. The rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court, the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. *The court would not be authorized to consider it as establishing an issue that was not before it at trial.*

*Id.* at 658.

Here, Defendant attempts to do the same thing that the defendant in *Trafton* attempted to do. In short, Defendant did not move to amend the pleadings until after the close of the evidence at trial. Yet, Defendant claims that Plaintiff consented to the inclusion of the

counterclaim by failing to object to the introduction of the evidence regarding overpayment at trial. Plaintiff did not object, however, not because he had consented to allowing Defendant to bring a counterclaim but because the evidence was introduced to defend against Plaintiff's claim, and Plaintiff knew that the evidence would be introduced for that purpose. As the *Trafton* court indicated, evidence frequently tends to establish more than one issue. However, evidence cannot be used to establish an issue that is not before the court. Defendant's attempt to include a counterclaim does precisely that which is proscribed by the *Trafton* opinion. Evidence cannot establish an issue that is not before the court, and Defendant's counterclaim was not before the court at trial.

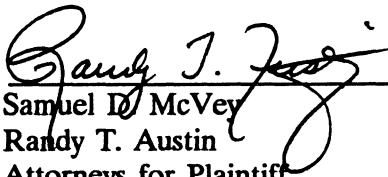
Plaintiff acknowledges that no objection was raised to the introduction of the evidence, but maintains that this failure was justified for at least two reasons. First, Plaintiff did not object to the introduction of evidence regarding payments because Plaintiff expected that evidence to be introduced to defend against Plaintiff's claim. Second, no objection could have been made because no motion was made to amend the pleadings to include the counterclaim until after the trial. Plaintiff should not have to speculate as to the purpose for introducing evidence and object to the introduction of evidence to prove a counterclaim before Defendant made any motion to raise the counterclaim. Even the motion to amend the pleadings at the close of the evidence did not specifically include the counterclaim. Thus, Plaintiff had to surmise--despite the court's express refusal to grant leave to file a counterclaim three months earlier and the fact that no motion had been made to include a counterclaim--that a counterclaim was before the court at trial. Plaintiff simply did not consent--impliedly or otherwise--to Defendant's bringing a counterclaim.

### CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the court reverse the lower court's ruling of no cause of action of Plaintiff' complaint. The court should hold that consideration supported the agreement and the parties' interest or accord and satisfaction, or, in the alternative, that Defendant is estopped from denying his promise to hold 2% of the stock of Medicode for plaintiff. The Court should also reverse the trial court's award of \$169,501.75 on Defendant's counterclaim. The amendment of the pleadings at trial to include a counterclaim was an abuse of discretion.

DATED this 20<sup>th</sup> day of January, 1995.

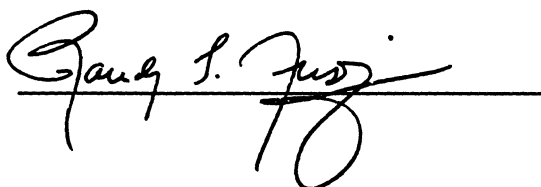
KIRTON & McCONKIE

By:   
Samuel D. McVey  
Randy T. Austin  
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 20<sup>th</sup> day of January, 1995, I caused a true and correct copy of the foregoing BRIEF OF PLAINTIFF/APPELLANT to be mailed through United States mail, postage prepaid, to the following:

Stephen G. Crockett  
Wesley D. Felix  
GLAUQUE, CROCKETT, BENDINGER & PETERSON  
170 South Main, #400  
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Gaudy L. Fugate", is written over a horizontal line.