

2006

GLFP, LTD., a former Utah limited partnership, v.
CL Management, LTD., a Utah limited partnership,
Clark Leaming Properties, LTD, a Utah limited
partnership, and Howard S. Clark and H. Scott
Clark, individuals: Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Brent E. Johnson, Katherine Norman; A. Bruce Jones; Holland & Hart; attorneys for appellant.
Jeffery S. Williams; Nelson, Christensen, Helsten, Hollingworth & Williams; attorneys for appellees.

Recommended Citation

Brief of Appellant, *GLFP v. CL Management*, No. 20060440 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6504

This Brief of Appellant 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.

IN THE UTAH COURT OF APPEALS

<p>GLFP, LTD., a former Utah limited partnership, Plaintiff and Appellant,</p> <p>v.</p> <p>CL MANAGEMENT, LTD., a Utah limited partnership, CLARK LEAMING PROPERTIES, LTD., a Utah limited partnership, and HOWARD S. CLARK and H. SCOTT CLARK, Individuals, Defendants and Appellees.</p>	<p>PLAINTIFF-APPELLANT REPLY BRIEF</p> <p>Case No. 20060440-CA</p> <p>Trial Court No. 050902498</p>
---	--

From The Final Judgment of the Third Judicial District Court,
Salt Lake County, Utah, Honorable Glenn K. Iwasaki Presiding

Brent E. Johnson, 7558
Katherine Norman, 9573
Holland & Hart LLP
60 East South Temple, Suite 2000
Salt Lake City, Utah 84111-1031
Telephone: (801) 595-7800
Facsimile: (801) 799-5700

A. Bruce Jones, Colorado Reg. #11370
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201-8749
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
Attorneys for Plaintiff-Appellant

Jeffery S. Williams
Jeffrie L. Hollingworth
Nelson Christensen & Helsten
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
Telephone: (801) 531-8400
Facsimile: (801) 363-3614
Attorneys for Defendants/Appellees



FILED
UTAH APPELLATE COURT

NOV 06 2006

IN THE UTAH COURT OF APPEALS

GLFP, LTD., a former Utah limited partnership,
Plaintiff and Appellant,

v.

CL MANAGEMENT, LTD., a Utah limited
partnership, CLARK LEAMING PROPERTIES,
LTD., a Utah limited partnership, and HOWARD
S. CLARK and H. SCOTT CLARK, Individuals,

Defendants and Appellees.

**PLAINTIFF-APPELLANT
REPLY BRIEF**

Case No. 20060440-CA

Trial Court No. 050902498

From The Final Judgment of the Third Judicial District Court,
Salt Lake County, Utah, Honorable Glenn K. Iwasaki Presiding

Brent E. Johnson, 7558
Katherine Norman, 9573
Holland & Hart LLP
60 East South Temple, Suite 2000
Salt Lake City, Utah 84111-1031
Telephone: (801) 595-7800
Facsimile: (801) 799-5700

A. Bruce Jones, Colorado Reg. #11370
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201-8749
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
Attorneys for Plaintiff-Appellant

Jeffery S. Williams
Jeffrie L. Hollingworth
Nelson Christensen & Helsten
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
Telephone: (801) 531-8400
Facsimile: (801) 363-3614
Attorneys for Defendants/Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The Numerous Procedural Issues Raised By Defendants-Appellees Are Not Before This Court.....	1
II. GLFP’s Claims Were Not Derivative.	3
III. The Trial Court Should Have Followed The “Closely-Held” Exception.....	6
IV. Futility Of Demand Was Clear.....	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

STATE CASES

<i>Aurora Credit Services, Inc. v. Liberty West Development, Inc.</i> , 970 P.2d 1273 (Utah 1998).....	6
<i>Caswell v. Jordan</i> , 362 S.E.2d 769 (Ga. App. 1987)	6
<i>Dansie v. City of Herriman</i> , 2006 UT 23, 134 P.3d 1139 (Utah 2006)	7
<i>Gillette v. Price</i> , 2006 UT 24, 135 P.3d 861 (Utah 2006).....	2
<i>Norman v. Nash Johnson & Sons' Farms, Inc.</i> , 537 S.E.2d 248 (N.C. App. 2000)	6
<i>Whalen v. Connelly</i> , 593 N.W. 2d 147 (Iowa 1999)	7

FEDERAL CASES

<i>New York Life Ins. Co. v. Ramco Holding Corp.</i> , 938 F. Supp. 754 (N.D. Okla. 1996)	4
---	---

STATUTES & RULES

Rule 7(c)(3)(B).....	1
Rule 19(a).....	3
Rule 23.1	1
Rule of Evidence 408.....	2
Utah Code § 48-2a-801	3

ARGUMENT

I. THE NUMEROUS PROCEDURAL ISSUES RAISED BY DEFENDANTS-APPELLEES ARE NOT BEFORE THIS COURT.

Much of the Response Brief is irrelevant, raising extraneous procedural issues that are not part of this appeal. For example:

- Defendants assert that GLFP's summary judgment oppositions did not comply with Rule 7(c)(3)(B). Br. at 13. While not following the format of that Rule, the oppositions clearly controverted a number of Defendants' factual assertions (and more importantly, the legal significance of those assertions). *See, e.g.*, R. at 255-56; 265-66. The trial court made no mention of Rule 7(c)(3)(B), and specifically found disputed issues of fact regarding Defendants' assignment argument. R. at 434.
- Defendants raise the assignment issue (sometimes referring to it as a question of standing), Br. at 6 n.1, 7, 12, even though they did not file a cross-appeal and the district court ruled against them on this aspect of their summary judgment motion. R. at 434. GLFP presented extensive evidence below that the assignment was not effective and, alternatively, that Defendants were estopped from asserting the assignment. R. at 314-316; 317-320. Given the district court's ruling and the lack of a cross-appeal, this question is simply not before this Court.
- Defendants argue that GLFP's complaint was not verified under Rule 23.1. Defendants did not make this argument in its summary judgment motions below and, in any event, GLFP's initial complaint was not submitted pursuant to Rule 23.1. After the district court held that GLFP's claims were derivative, GLFP filed a motion to amend the

complaint. The trial court denied that motion so GLFP was not allowed to file an amended complaint, verified or otherwise.

- Defendants argue that GLFP’s motion to reconsider was improper under *Gillette v. Price*, 135 P.3d 861 (Utah 2006). *Gillette* was decided in April of this year, while the motion to reconsider was filed in November 2005. R. at 467. *Gillette* specifically indicated that its holding was to be applied prospectively. 2006 UT 24, ¶ 8, 135 P.3d at 863. Moreover, the holding is intended to clarify when judgment is final for purposes of calculating the time to file an appeal. *Id.* Here, the trial court issued its summary judgment decision, but did not enter a final judgment thereon. R. at 436. Thus, GLFP’s motion to reconsider had no impact on the timing of appeal in this case.
- Defendants also argue that GLFP submitted inadmissible “settlement documents” in support of its motion to amend to allege futility of demand. Br. at 32 n. 7. Rule 408 of the Utah Rules of Evidence did not preclude GLFP’s use of these documents. They were submitted not to prove liability, but to demonstrate that the parties had previously attempted to resolve GLFP’s claims – without success – and that futility of demand was apparent. Rule 408 does not preclude submission of “settlement negotiations” under these circumstances.
- Finally, Defendants argue that GLFP failed to name all the required parties for its dissolution claims against CL Mgmt and CL Properties. They fail to note that these entities are also owned by the Clarks and Leamings, such that adding them does not bring any new interests to the case. Moreover, Defendants did not raise this issue below, and nothing in the dissolution statute states that all general and limited partners are needed in a

dissolution proceeding. *See* Utah Code § 48-2a-801. None of the cases cited by Defendants so hold. And, if additional parties were necessary, the remedy is to add those parties, not dismiss the case. U.R.C.P. 19(a).

Ultimately, Defendants argue that “GLFP’s complaint is fatally defective on many grounds, and the trial court correctly dismissed it pursuant to establish Utah law and procedure.” Br. at 31. To the contrary, the trial court did not dismiss GLFP’s complaint because of the procedural defects now alleged by Defendants. Instead, it granted summary judgment because of its conclusion that each of GLFP’s claims was derivative and could not be brought directly. R. at 436. That conclusion is the primary issue on appeal, along with GLFP’s alternative arguments that an exception to the derivative-suit requirements should have been applied in this case, and/or that GLFP should have been allowed to pursue the claims while asserting futility of demand. These numerous procedural arguments are but further attempts to avoid the underlying issue: the Leamings no longer want to do business with the Clarks, but have been unable to extricate themselves from that abusive relationship.

II. GLFP’S CLAIMS WERE NOT DERIVATIVE.

Despite its 37 page length, Defendants-Appellees’ brief does virtually nothing to address GLFP’s assertion that the commingling and diversion of assets by CL Mgmt –for the benefit of solely Clark-owned entities – constituted direct

harm to GLFP. Defendants are so focused on improper fees that they attempt to deal with GLFP's primary argument in a mere footnote of their brief. Br. at 23 n. 4. There, they assert that "A reduction in distributions to a limited partner, based upon *an alleged harm suffered by the partnership*, is the very definition of a derivative claim." (Emphasis added.) GLFP never alleged, however, that its distributions were reduced because of "an alleged harm suffered by the partnership." GLFP's claim was that the Clarks and CL Mgmt were using CL Mgmt funds for purposes that benefited only the Clarks, and not GLFP/the Leamings, *i.e.*, that directly and uniquely harmed GLFP. GLFP was effectively funding – through reduced distributions – various Clark entities managed by CL Mgmt.

The case cited by Defendants, *New York Life Ins. Co. v. Ramco Holding Corp.*, 938 F. Supp. 754 (N.D. Okla. 1996), while superficially similar, is quite different when carefully compared to this case. In *New York Life*, the limited partner sued the general partner (here, by comparison, the Clarks as individuals), alleging that the general partner was overcharging the limited partnership (here, by comparison, CL Mgmt) for services and was wrongfully taking funds from the limited partnership. *Id.* at 757. In contrast, here one limited partner (GLFP), alleged that the limited partnership itself was wrongly collecting fees from a different limited partnership (also owned by the Clarks and Leamings), and then

failing to pass through those fees, instead using them for other purposes.

CL Mgmt is not the entity harmed by this process – only GLFP was harmed.

The closely-held, inter-related nature of the various entities is what makes the harm unique to GLFP. While the other primary limited partner – HCFP – might also claim reduced distributions, it had no incentive or likelihood to do so when the funds were being used to benefit other Clark entities. Thus, while *New York Life* is similar with respect to the factual allegations made by the plaintiff, it is distinguishable because of the foregoing facts and because *New York Life* did not involve closely-held, inter-related family businesses. Instead, it appears that New York Life was a limited partner with unrelated business entities. And, New York Life is obviously not a closely-held family partnership, nor was it part of such a partnership. Further, if this Court were inclined to apply the analysis of *New York Life*, it is another reason why the closely-held exception to derivative claims should be invoked in this instance.

Finally, Defendants respond to GLFP's dissolution/accounting claims by simply repeating their arguments about the alleged derivative nature of GLFP's claims. They ignore what is inconvenient to their argument, *i.e.*, that GLFP made numerous allegations – beyond excess fees – supporting dissolution. *See* Opening Br. at 12-13. Dissolution must be available to allow GLFP and the Leamings to extricate themselves from the Clarks.

III. THE TRIAL COURT SHOULD HAVE FOLLOWED THE “CLOSELY-HELD” EXCEPTION.

Defendants-Appellees assert that the “closely-held” exception does not apply “as a matter of law” because GLFP did not prove that it applied. Br. at 26. This circular logic is not supported by the only case cited by Defendants – *Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970 P.2d 1273 (Utah 1998). *Aurora Credit* simply acknowledged the exception and remanded the case to the trial court to address other issues. *Aurora Credit* did not hold that the burden was on the plaintiff to prove that a direct action would not prejudice creditors, as argued by Defendants. Br. at 27-28. Other courts have held that, in the *absence of evidence* of prejudice to creditors, a direct action is appropriate. *See, e.g., Norman v. Nash Johnson & Sons’ Farms, Inc.*, 537 S.E.2d 248, 259 (N.C. App. 2000) (“Still further, there is no indication in this record that the involved corporations are insolvent, or that the rights of corporate creditors are otherwise prejudiced by the possibility of an individual recovery in this case.”); *Caswell v. Jordan*, 362 S.E.2d 769, 773 (Ga. App. 1987) (“There was no evidence of any creditor in need of protection; . . . and since [plaintiff] is the only injured shareholder, there can be no prejudice to others not a party to the suit.”). That is the situation here – there is a lack of evidence of prejudice to creditors. Therefore, the district court erred in refusing to allow GLFP to proceed directly against Defendants.

IV. FUTILITY OF DEMAND WAS CLEAR.

Finally, Defendants argue that GLFP should not have been allowed to amend its complaint to allege futility of demand in light of the Supreme Court's recent decision in *Dansie v. City of Herriman*, 2006 UT 23, ¶ 17, 134 P.3d 1139 (Utah 2006). *Dansie* is clearly distinguishable. First, the company in *Dansie* was not a closely-held corporation. 2006 UT 23, ¶17, 134 P.3d at 1145.¹ Second, there is nothing to indicate that the company's management—to whom demand would be directed—was alleged to have engaged in the very misconduct that was the subject of the claims. Further, the case cited by Defendants—*Whalen v. Connelly*, 593 N.W. 2d 147 (Iowa 1999) – involved a board that was not conflicted. *Id.* at 157-58. Here, on the other hand, the Clarks acknowledged their conflict of interest through their “offer” to retain an allegedly disinterested party to evaluate the claims. Opening Br. at 18-19. Even that offer is suspect, however, because of Mr. Clark's conflict.

Defendants argue that GLFP's view of Mr. Clark's conflict was an “after-the-fact belief.” Br. at 32. To the contrary, from the outset, GLFP alleged misconduct by Mr. Clark that clearly disqualified him from evaluating GLFP's claims. R. at 3-5. In any event, the trial court did not address this issue, instead

¹ Note, however, that the trial court in *Dansie*, rather than dismissing the case at the outset, granted the plaintiffs leave to refile as derivative claims. 2006 UT 23, ¶17, 134 P.3d at 1145.

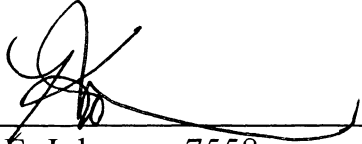
ruling that the motion to amend was “moot”. Defendants do not try to defend this ruling, which was clearly erroneous.

CONCLUSION

GLFP and the Leamings have been held hostage by the Clarks and CL Mgmt. Their claims – when considered in the context of closely-held, family limited partnerships – are a proper basis for ending that relationship. The district court’s summary judgment should be reversed and this case remanded so that GLFP may pursue its claims, either directly or via an amended complaint.

Dated this 6th day of November, 2006.

HOLLAND & HART LLP

By: 
Brent E. Johnson, 7558
Katherine Norman, 9573
Holland & Hart LLP

A. Bruce Jones, #11370
Holland & Hart LLP

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that two (2) true and correct copies of the REPLY BRIEF were hand delivered on November 6, 2006 to the following

Jeffery S. Williams
Jeffrie L. Hollingworth
Nelson Christensen & Helsten
68 South Main Street, Suite 600
Salt Lake City, Utah 84101