

1996

## Larry Clayton v. Kip Eardley : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH <sup>APPEALS</sup> SUPREME COURT

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LARRY CLAYTON,	:	Supreme Court
	:	No. <u>950460</u> 960172-CA
	:	
Plaintiff and Appellant,	:	Appeal from the
	:	Third Judicial District
vs.	:	Court, Salt Lake County
	:	Judge William B. Bohling
KIP EARDLEY,	:	District Court # 950903536
	:	
Defendant and Appellee.	:	Priority 15

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APPELLANT'S REPLY BRIEF

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COURT OF APPEALS

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## ARGUMENT

### **MATERIAL QUESTIONS OF FACT EXIST REGARDING THE TERMS OF THE CONTRACT PRECLUDING SUMMARY JUDGMENT.**

The trial court's basis for granting summary judgment for Mr. Eardley is succinctly stated in its Conclusions of Law No. 4:

The evidence amply demonstrates that the conduct alleged by plaintiff is equally referable to a series of six contracts each having a duration of one year as it is to a single contract for a term of more than one year. (emphasis added)

The very language of the finding demonstrates the existence of a material question of fact, i.e., what was the term of the plaintiff's contract, renewable yearly (as claimed by Mr. Eardley) or open ended with no ending date (as claimed by Mr. Clayton)? If indeed, as the trial court states in said Conclusion of Law, Mr. Clayton's conduct shows a series of one year contracts as equally as it shows one contract for more than one year, the material fact question is self evident. And if the evidence appears to support either proposition equally, the issue should be left for trial. Thus the very existence of that question, with each side alleging by affidavit the opposite of the other, precludes summary judgment.

The question of fact is material since if the parties had only one contract with no ending date, then all of plaintiff's conduct necessarily related only to that single multi-year contract and the part performance exception of the Statue of Frauds clearly applies. If, however, it is a series of yearly contracts then his conduct relates to more than one contract and, according to Mr. Eardley's reasoning, defeats the part performance exception.

A contract admittedly exists between the parties, only the terms thereof are in question. (R.24, 25) With each side claiming different terms of the oral contract the question naturally arises, who is right, Mr. Clayton or Mr. Eardley? The decision of whose version of the oral contract's terms is correct is logically material to solving the dispute. Hence, the fact question is material to the issues at hand.

Indeed, Mr. Eardley's own arguments show that a material fact question exists. For example, on page 6 of his brief he states his postulate that, Clayton's buying of the tickets is not exclusively referable to an alleged contract then states,

Just as likely, Eardley merely offered, on six different occasions, to sell season and playoff tickets to Clayton, which separate offers Clayton accepted from 1989 to 1994. In this scenario, there were actually six contracts, each lasting one season rather

than one continuous contract alleged by Clayton. (emphasis added)

Such language as "just as likely" and "in this scenario" and to accompanying argument is not that of a case where fact questions are settled, but are the language and argument of uncertainty as to which it is, one contract or more than one contract.

Likewise in point III, on page 8 of Mr. Eardley's brief, in attempting to defeat plaintiff's claims that material fact questions exist, actually admits that they do:

Any factual questions go only to whether there was one indefinite contract between Clayton and Eardley or whether or there were six new contracts. (emphasis added)

This is the same unresolved fact questions that Clayton raises and shows that Clayton and Eardley both believe a fact question remains.

Summary judgment was inappropriate because, viewing the facts in a light most favorable to him as required by law, (i.e. that there was only one contract and Mr. Clayton performed under it for six years) shows a valid claim of part performance sufficient to remove the contract from the Statue of Frauds. The question of whether the contract was one for years or a series of one year contracts is a the material question of fact which should defeat

Mr. Eardley's summary judgment motion. Summary judgment is proper only when there are no genuine issues of material fact. Utah Rules of Civil Procedure 56 (c); *Higgins v. Salt Lake County*, 855 p.2d 231 (Utah 1993). The trial court erred in applying the law of part performance and incorrectly held there were no disputed issues of material fact.

#### CONCLUSION

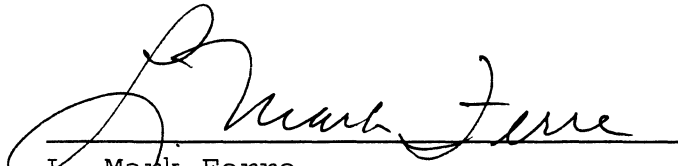
Mr. Eardley basis his argument on the premise that the Court found it equally likely that there were six one year contracts as there was one multi-year contract, therefore, Mr. Clayton cannot claim part performance. He reasons that therefore, Mr. Clayton's performance is not "exclusively referable" to a contract. However, the entire argument of Mr. Eardley only goes to demonstrate that there was indeed a material question of fact precluding summary judgment: whether or not there were six separate contracts or one multi-year contract. If there was only one multi-year contract Mr. Clayton's performance could only be attributed to that contract. If there was more than one contract, then his conduct would be attributed to several contracts. However, either way that question is answered, it raises a material question of fact that precluded summary judgment. The facts looked at in a light most favorable to Mr. Clayton show that summary



judgment was improper and that the decision of the trial court should be reversed.

DATED this 11 day of March, 1996.

TAYLOR, ENNENGA, ADAMS & LOWE

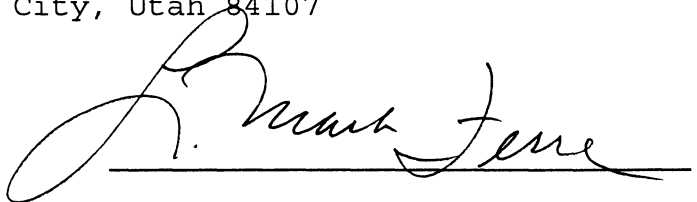
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Attorneys for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing were mailed postage prepaid this 11 day of March, 1996, to the following:

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A handwritten signature in cursive script, reading "L. Mark Ferre", written over a horizontal line.