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Wesley Clock, Anne Clock v. John F. Green, LaRue Green : Response to Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF
UTAH
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DOCKET NO. 960797-CA

IN THE UTAH COURT OF APPEALS

WESLEY CLOCK and ANNE CLOCK,	)	
Plaintiffs/Appellees,	)	**RESPONSE TO APPELLANTS' PETITION FOR REHEARING**
vs.	)	Case No. 960797-CA
JOHN F. GREEN and LARUE GREEN,	)	Priority No. 15
Defendants/Appellants.	)	

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, THE HONORABLE HOMER WILKINSON PRECEDING

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IN THE UTAH COURT OF APPEALS

WESLEY CLOCK and ANNE CLOCK, Plaintiffs/Appellees, vs. JOHN F. GREEN and LARUE GREEN, Defendants/Appellants.	)	**RESPONSE TO APPELLANTS' PETITION FOR REHEARING** Case No. 960797-CA Priority No. 15

COME NOW the appellees, Wesley Clock and Anne Clock by and through their attorney Bryan W. Cannon and submit this response to Appellants' Petition for Rehearing as provided under Rule 35 of the Utah Rules of Appellate Procedure. This response is made in support of the Memorandum Decision filed on October 2, 1997 upon the following points and authorities.

POINT ONE

THE AGREEMENT MAY BE INTERPRETED AS A MATTER OF LAW

Appellant argues that the case of *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979) requires an evidentiary hearing to determine the "payment within a reasonable time". However, our case is different than the *Ferris* case in that our contract includes and designates a time for exercise of the option. In *Ferris* the court held that reasonableness of payment under an option is a question of fact, when a time is not specified within the agreement. However, under the terms of the Green contract, the Clocks had until August 5, 1996 to pay the balance of $81,500.

An option contract which can be determined by the words of the agreement need not look to extrinsic evidence but can be interpreted as a matter of law. *Estate of Schmidt Downs*, 775 P.2d 427, 430 (Utah Ct. App. 1989). Pursuant to *Mills v. Broody*, 929 P.2d 360 (Utah App. 1996), the option must be read to require the payment upon exercise. Since our contract has an exercise date, extrinsic evidence would not effect the result. Reliance upon a "reasonable time" rule for payment is thus misplaced when the amount of the payment and the exercise due date are specified.

POINT TWO

THE CONTRACT IS INTEGRATED SO THAT
EXTRINSIC EVIDENCE IS NOT ADMISSIBLE

A contract unambiguous on its face is interpreted as a matter of law and extrinsic evidence of intent is not admissible under the parol evidence rule. *Faulkner v. Farnsworth*, 665 P.2d 1292 (Utah 1983); *Estate of Schmidt Downs*, 775 P.2d 427 (Utah Ct. App. 1989). An appellate standard review of a trial court's ruling on a contract unambiguous on its face is whether the trial court applied the correct interpretation of law to the contract terms. *Zions First National Bank v. National American Title Insurance Co.*, 749 P.2d 651 (Utah 1986). Not all possible option terms and conditions are required in order to make an integrated contract. This court correctly concluded that the Clocks provide a notice of intent to exercise the option in April 1996 when under the terms of the contract the Clocks had until August 5, 1996, to pay the balance of $81,500. Options to purchase that fail to specify a manner of exercise of the option price must be read to require payment upon at the time of the exercise of the option and the court need not to examine extrinsic evidence when the contract provision can be determine by the

words of the agreement. *Estate of Schmidt* 775 P.2d at 430 and *Mills* 929 P.2d at 364.

POINT THREE

APPELLANTS MAY NOT TAKE A POSITION WHICH IS INCONSISTENT WITH THE THEORY USED BEFORE THE TRIAL COURT

It is a well recognized doctrine of appeal and error that a party is not permitted to assume a position on appeal which is contrary or inconsistent with the parties' specific position, ground of action or defense taken before the trial court. *Butler, Crockett and Walsh Development Corp. v. Pinecrest Pipeline Operating Company*, 909 P.2d 225 (Utah 1995); *Brigham City v. Mantua Town*, 754 P.2d 1230 (Utah Ct. App. 1988); *Matter of Adoption of B.O.* 927 P.2d 202 (Utah App. 1996); *Merriam v. Merriam*, 799 P.2d 1171 (Utah App. 1990).

In this case the Clocks and Greens had counter-motions for summary judgment. By making a Motion for Summary Judgment, the Greens were asserting that this case could be decided as a matter of law. By now arguing that it is error to decide this case as a matter of law, the appellants are seeking an appellate review of an error that the Greens invited. In *Brigham City*, the city took the position at the trial court that a contract was not a proper subject for interpretation without evidentiary facts, but on appeal alleged that the contract was unambiguous on its face and that the trial court should have ruled on the contract as a matter of law. This switch of positions was not permitted. The Greens are attempting to do the very same thing in reverse; that is, switch strategies by alleging and taking a position which is contrary or inconsistent with the specific position taken at the trial court level.

CONCLUSION

The memorandum decision in this case is the correct decision based upon case law since the contract has a specific time for exercise of the contract and can be otherwise interpreted by the words of the agreement. The Greens also cannot now take a position inconsistent with that taken at the trial court level by claiming that issues of fact exist when that position is inconsistent with the position taken at the trial court level.

Dated this 10th day of December, 1997.

Bryan W. Cannon
Attorney for Plaintiffs/Appellees

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed ~~a~~ two(2) true and correct copy of the foregoing **RESPONSE TO APPELLANTS' PETITION FOR REHEARING**, this 10th day of December, 1997, to the following:

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Sandra J. Whitaker