

1977

# Marion W. Beckstrom v. Vere Beckstrom and Norman Laub : Brief of Appellants

Utah Supreme Court

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J. MacArthur Wright; Attorney for Appellant;

Borris & Bishop; Attorneys for Appellant; Allen, Thompson, Hughes & Behle; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARION W. BECKSTROM,

Plaintiff and Respondent,

vs.

VERE BECKSTROM and NORMAN LAUB,

Defendants and Appellant.

NORMAND D. LAUB and BARBARA R. LAUB,

Cross Plaintiffs and Appellants,

vs.

VERE BECKSTROM and ELIZABETH S.  
BECKSTROM,

Cross Defendants and Respondents,

Case No. 15273

BRIEF OF APPELLANTS

Appeal from Judgment of Fifth Judicial District Court  
for Washington County, State of Utah, Honorable Don V.  
Tibbs, District Judge Pro Tem, Presiding.

Willard R. Bishop  
Morris and Bishop  
172 North Main Street  
Cedar City, Utah 84720  
Attorney for Appellants

J. MacArthur Wright  
75 North 100 East  
P. O. Box 339  
St. George, Utah 84770  
Attorneys for Respondents Vere  
Beckstrom and Elizabeth S. Beckstrom

Michael D. Hughes  
Allen, Thompson, Hughes & Behle  
148 East Tabernacle  
St. George, Utah 84770  
Attorney for Respondent  
Marion W. Beckstrom

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARION W. BECKSTROM,  
Plaintiff and Respondent,  
vs.  
VERE BECKSTROM and NORMAN LAUB,  
Defendants and Appellant.

NORMAND D. LAUB and BARBARA R. LAUB,  
Cross Plaintiffs and Appellants,  
vs.  
VERE BECKSTROM and ELIZABETH S.  
BECKSTROM,  
Cross Defendants and Respondents,

Case No. 15273

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action by Plaintiff to determine rights in real property and for partition, and an action by Cross Plaintiffs for specific performance, or, failing that, for monetary damages for breach of contract.

DISPOSITION IN LOWER COURT

Plaintiff was granted judgment and partition, receiving one-half of the disputed property and one-half of the appurtenant water rights. Cross Plaintiffs and Appellants were granted one-half of the real property and one-half of the appurtenant water rights, and were awarded attorney fees

in the amount of \$500.00, appraisal costs of \$250.00, and costs of Court.

#### RELIEF SOUGHT ON APPEAL

Appellants seek an order of this Court striking the \$5,000.00 damage figure granted Appellants by the trial court and remanding the case for entry of judgment in favor of Appellants and against Cross Defendants and Respondents in the amount of \$19,767.13, with interest at the judgment rate from and after 15 March 1977 until fully paid, and further, Appellants seek an order of this Court striking the lower court's award of \$500.00 in attorney fees to Appellants and remanding the matter to increase the award of attorney fees to the sum of \$800.00 for Appellants' counsel's services through trial, and requiring the trial court to determine and award to Appellants a reasonable fee for the use and benefit of their counsel in the conduct of this case on appeal.

#### STATEMENT OF FACTS

By written contract dated 14 December 1972, Cross Defendants and Respondents Vere Beckstrom and Elizabeth S. Beckstrom agreed to sell to Appellants and Cross Plaintiffs Normand D. Laub and Barbara R. Laub, 80 acres of land located in Iron County, State of Utah, with its appurtenant water rights, for the sum of \$20,000.00, principal and interest at 6% per annum payable annually on the 1st day of November of each succeeding year (R 111, Exh. D-14). At the time of

executing said contract, title to the land and water was vested in Plaintiff and Respondent Marion W. Beckstrom and Vere Beckstrom, as tenants in common (T 7:8-15). The Uniform Real Estate Contract was prepared by Spencer Beckstrom, a lawyer in California, the son of Vere Beckstrom and Elizabeth S. Beckstrom (T 59:17-29). The description on the contract had been given to Spencer Beckstrom by Vere Beckstrom (T 60:5-10). At all times thereafter, Appellants Normand D. Laub and Barbara R. Laub were current in their obligations to Vere Beckstrom and Elizabeth S. Beckstrom (T 61:14-28). Appellants Laub, by reason of representations of Respondent Vere Beckstrom, believed that Vere Beckstrom owned the land and water concerned (T 82:16-19; 84:10-20). Vere Beckstrom did not at any time tell Appellants Laub that Respondent Marion W. Beckstrom owned any interest in the property (T 85:2-4). Appellants Laub did not conduct a title search concerning the property in dispute, relying upon the word of Respondent Vere Beckstrom (T 89:9-19).

On 30 September 1974, Plaintiff and Respondent Marion W. Beckstrom instituted this action (R 1). Appellant Norman Laub was served with process on 14 November 1974 (R 8). After so being given notice of the claim of Marion W. Beckstrom to an interest in the land, Appellants Laub made their checks under the contract payable to Marion W. Beckstrom and Vere Beckstrom (Exh. P-6, P-7, P-9). Despite the fact that the name of Marion W. Beckstrom appeared on such checks,

Vere Beckstrom endorsed thereto not only his own name, but the name of Marion W. Beckstrom, and cashed the checks (T 12:1-30; 13:1-10). On 1 November 1976, the total amount due and owing from Appellants Laub to Respondents Vere Beckstrom and Elizabeth S. Beckstrom was the sum of \$15,000.00, being principal (T 90:24-30; 91:1-8). On 25 January 1977, Appellants Laub made tender of payment to Vere Beckstrom and Elizabeth S. Beckstrom, of the total amount due and owing on the purchase price for the land (Exh. D-16). On 26 January 1977, Vere Beckstrom and Elizabeth S. Beckstrom, through their then counsel of record, John W. Palmer, refused to deliver title to the land to Appellants Laub, free and clear of the claim of Marion W. Beckstrom (Exh. D-15). At the time of tender, Appellants Laub were ready, willing and able to perform their obligation of payment to Respondents Vere Beckstrom and Elizabeth S. Beckstrom, Appellants Laub having arranged for a loan from their bank to cover such payment (T 86:26-30; 87:1-5).

At trial, the uncontested testimony of expert witness Ken William Esplin, which was admitted and accepted by the court, was to the effect that the value of the land and water together was the sum of \$20,000.00 on 14 December 1972, and that the value of the same had risen to \$70,200.00 by the time of the refusal of Respondents Vere Beckstrom and Elizabeth S. Beckstrom to convey the same to Appellants (T 96:6-26; 97:15-27). Uncontested evidence as to the amount



of a reasonable attorney fee to be awarded to Appellants Laub was that such amount was the sum of \$800.00 (T 100:6-19). Despite such uncontested evidence, after trial the lower court failed to follow the applicable rule of damages, failed to award Appellants Laub damages other than awarding them one-half of the real property and appurtenant water rights and determining that Appellants Laub owed nothing further to Respondents Vere Beckstrom and Elizabeth S. Beckstrom, and awarded said Appellants attorney fees in the sum of only \$500.00. The trial court further ruled that Appellants Laub had a duty to research title to the property in dispute, and that Appellants Laub breached such duty by not conducting such search.

#### POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT DEFENDANT, CROSS PLAINTIFF AND APPELLANT NORMAND D. LAUB HAD A DUTY TO INVESTIGATE THE STATUS OF TITLE TO THE PROPERTY, AND THAT HE BREACHED A DUTY IN NOT SO DOING.

The trial court ruled that Appellant Normand D. Laub had a duty to research the status of title to the property in dispute, and that he breached a duty in not so doing (T 105:18-23; and R 113). Such ruling is contrary to law.

The applicable portion of the contract between Appellants Laub and Respondents Vere Beckstrom and Elizabeth S. Beckstrom reads:

"The seller on receiving the payments herein reserved to be paid at the time and in the

manner above mentioned agrees to execute and deliver to the buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances . . . "

It is clear that Respondents Vere Beckstrom and Elizabeth S. Beckstrom had no duty to obtain or transfer marketable title until such time as Appellants Laub had complied fully with their obligations under the contract. Such obligations were not completed in full until 25 January 1977, when Appellants Laub tendered full performance and payment to Respondents Vere Beckstrom and Elizabeth S. Beckstrom.

Where a seller enters into an executory contract, the law permits him to have defective title at the time he enters into the contract and it is sufficient if he is able to convey good title when the time for conveyance arrives. See 77 AmJur 2d 408, Vendor and Purchaser, Section 234. Also see Marlowe Investment Corporation v. Radmall, 485 P.2d 1402, 26 Utah 2d 124 (1971); Leavitt v. Blohm, 357 P.2d 190, 11 Utah 2d 220 (1960); Woodard v. Allen, 265 P.2d 398, 1 Utah 2d 220 (1953); and Naylor v. Jolley, 111 P.2d 142, 100 Utah 130 (1941).

Had Appellant Normand D. Laub conducted a title search prior to tender of full payment, such search would merely have shown that Respondents Vere Beckstrom and Elizabeth S. Beckstrom did not hold marketable title to the land, at time when they were not required to hold marketable title.

law will not require a futile act. Such being the case, Appellant Laub owed no duty to Respondents Vere Beckstrom and Elizabeth S. Beckstrom to conduct such title search, and the only duty involved in this case was that of Respondents Vere Beckstrom and Elizabeth S. Beckstrom to convey good and marketable title to Appellants Laub when tender of payment and performance was made, which duty was breached by failure to convey. Even had Appellants Laub known of the non-marketable state of the title of Respondents Vere Beckstrom and Elizabeth S. Beckstrom, Appellants Laub could not have required said Respondents to perfect such title prior to full performance or tender thereof by Appellants Laub. Upon such tender by Appellants Laub, Respondents Beckstrom failed in their duty.

By reason of all of the foregoing, the trial court erred in ruling as it did, and in denying damages to Appellants Laub based upon such erroneous ruling.

## POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO APPLY THE PROPER MEASURE OF DAMAGES AND FAILED TO AWARD TO APPELLANTS LAUB, DAMAGES IN THE AMOUNT OF \$19,767.13.

With respect to a vendee's damages by reason of a vendor's failure to convey, the general rule is that the vendee is entitled to recover the fair market value of the land at the time of breach, less any amounts of the purchase money remaining unpaid. 77 AmJur 2d 648, Vendor and Purchaser, Section 519, states, in part:

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"The general rule is laid down in many cases that the purchaser is entitled, as general damages for the wrongful failure or refusal of the vendor to convey, to recover the difference between the actual value of the land and the agreed price, together with any payments he may have made, or the value of the land deducting the amount of the purchase money unpaid. These statements are substantially the same in effect and result in giving the purchaser as damages the benefit of his bargain, in case the land is worth more than the price agreed upon. This is very generally recognized where the vendor cannot be said to have acted in good faith, as where, after the making of the contract, he disables himself by his own act or neglect from being able to convey, or where, having the ability to do so, he refuses to convey because of an advance in the value of the land or otherwise, or where he had knowledge of his want of or the defects in his title." (Emphasis supplied.)

See also 11 A.L.R.2d 719, at 721; Reed v. Wadsworth, 553 P.2d 1024, at 1035 (Wyo. 1976); and Abond v. Adams, 507 P.2d 431, 84 N.M. 683 (1973).

Utah law follows the general rule. In Utah, the measure of damages where a vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee. See Bunnell v. Bills, 368 P.2d 597, 13 Utah 2d 33 (1962); and Andreasen v. Hansen, 335 P.2d 404, 3 Utah 2d 370 (1959).

Respondent Marion W. Beckstrom and Respondent Vere Beckstrom are brothers. They took title to the land and water in question as tenants in common. Respondent Vere Beckstrom knew of such fact. Further, when Appellants Land made the 1974, 1975 and 1976 payments by check to the order

of Vere Beckstrom and Marion W. Beckstrom, Respondent Vere Beckstrom cashed such checks, forging the endorsement of Marion W. Beckstrom. Clearly, Appellants Laub are entitled to recover damages from Respondents Vere Beckstrom and Elizabeth S. Beckstrom, based upon the fair market value of the land and water at the time of breach on the part of Respondents Beckstrom. The only question is the amount which should be awarded to Appellants Laub.

The unrebutted, uncontested evidence before the Court, which the Court admitted and accepted, showed that the fair market value of the 80 acres of land, with appurtenant water, at the time of breach was the sum of \$70,200.00. At the time of trial, there still remained due and owing on the contract the sum of \$15,000.00 principal, with interest thereon at 6% per annum from and after 1 November 1976 until the date of trial, which simple calculation shows to be the sum of \$332.87.

Where a rule of law has been established for the measurement of damages, it must be followed by the finder of fact. Bunnell v. Bills, supra; and 15 AmJur, Damages, Section 366, page 805. The lower court did not follow the appropriate rule of law, but rendered only a "Bishop's Judgment

In this case, the court is bound by the only evidence before it, which is that the value of the 80 acres of land with appurtenant water is the sum of \$70,200.00, and that the total amount due and owing by Appellants Laub

to Respondents Vere Beckstrom and Marion S. Beckstrom as of the date of trial of this action was the sum of \$15,332.87. Since the court must follow the rule of law established for determining damages by the Utah Supreme Court, the simple calculations below show that Appellants are entitled to recover damages from Respondents Vere Beckstrom and Elizabeth S. Beckstrom in the amount of \$19,767.13.

<u>Item</u>	<u>Amount</u>
1. Value of 40 acres of land at time of breach, with appurtenant water, reached by dividing total value of \$70,200.00 in half:	\$35,100.00
2. Less \$15,000.00 principal due and owing on contract dated 12/14/72:	15,000.00
3. Less interest upon principal amount of \$15,000.00 at 6% per annum, from and after 11/1/76 through 3/15/77, the day of trial of this action:	<u>332.87</u>
4. Total:	\$19,767.13

Appellants Laub are entitled to the benefit of their bargain, and the value of such bargain is the sum of \$19,767.13. To rule as the trial court ruled is to say that the seller may sell land on contract, and then when the price rises, refuse to convey to his buyer, and resell the property at a higher price, the buyer having run the risk of the property depreciating in value. This Court should overrule the trial court, and remand this matter to the trial court for an award of damages to Appellants Laub in the sum of \$19,767.13.

### POINT III

THE COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY AWARDING APPELLANTS LAUB ONLY \$500.00 FOR THE SERVICES OF THEIR ATTORNEY.

The inadequate or excessive taxation of attorney fees thwarts justice. There is general agreement not only that fees of attorneys should be adequate, but also that fees should be determined on the basis of a number of factors. 57 A.L.R. 3d 475, 2(a). The Code of Professional Conduct of the American Bar Association, adopted substantially in its entirety by the Utah State Bar Association, sets forth in DR2-106(b) many of the criteria to be followed by courts in awarding attorney fees. DR2-106(b) states, in part:

"Factors to be considered as guides in determining the reasonableness of a fee include the following: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar legal services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent."

The amount of time and labor expended by the attorney is of major importance. In 57 A.L.R. 3d 475, 2(a), we read:

"It appears to be universally agreed that the amount of time and labor expended by the attorney on behalf of his client is, in general, one of the most important factors, if not the most important factor, considered by the courts in determining what constitutes a reasonable fee in a particular case. . . ."

The real test, however, is the value of the service performed by the attorney for his client. The Supreme Court of Kansas has said on this point:

"The real test in the allowance of attorney fees is the value of the services performed by the attorney on behalf of his client; and the court in determining the amount thereof may consider labor, time and trouble involved, as well as the extent of services rendered and the nature and importance of the litigation; also the responsibility imposed on such counsel; the amount of money involved; the skill and experience called for in the performance of the services; the professional character and the standing of the attorney; and the results secured." (Attebery v. MFA Mutual Insurance Company, 191 Kansas 178, 388 P.2d 647 (1963).)

Applying the "value of service" test in the above case, the Kansas court rejected the contention that the amount in controversy should control the fee awarded and granted attorney fees of \$400.00 in an action to recover the value of an automobile under collision coverage, where the verdict for the plaintiff was only \$300.00 and the insurer tendered \$272.50.

The Utah Supreme Court found \$1,056.00 not excessive attorney fees in successfully foreclosing a \$6,068.00 mortgage where the defendant set up as a defense a breach of a separate contract and a counterclaim for specific performance.



Wallace v. Build, Inc., 402 P.2d 699, 16 Utah 2d 401 (1965).

The Supreme Court has also felt that an attorney fee of \$2,500.00 is not unreasonable when involved in a summary judgment concerning a trust deed securing a note of \$27,500.00 for the time and amount of work was taken in evidence.

Security Title Company v. Payless Builders Supply, 407 P.2d 141, 17 Utah 2d 179 (1965).

This Court has made the following statement, as early as 1915, about what constitutes a reasonable fee:

"By a 'reasonable fee', no doubt, is meant one which is reasonable under all the facts and circumstances of each case. What is reasonable, therefore, in a large measure at least, must depend upon the amount in controversy, the labor, and responsibility imposed upon the attorney in obtaining judgment, as these things may have arisen from the issues presented and tried. If an attorney is required to do no more than to prepare the formal pleadings and decree in a default case, a smaller sum, no doubt, would be reasonable, than in a contested case, . . ." (Jensen v. Lichtenstein, 145 P. 1036, 45 Utah 320 (1915); emphasis supplied.)

As a tool of justice for all concerned, therefore, the adequacy of attorney fees should always be considered where allowed in order to insure that the aggrieved will obtain adequate representation. Attorneys cannot hope to be compensated fully for the value of their time and work, but they must not be limited to such small fees that they cannot afford to accept representation.

The applicable provision of the contract in question states:

"The buyer and seller each agree that should they default in any of the covenants or agree-

ments contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise." (Emphasis added.)

The uncontested, unrebutted testimony before the Court, by which the Court is bound, shows that counsel for Appellants Laub, in preparing for and conducting trial, spent 20 hours of time. Further, testimony is to the effect that the agreed upon rate of \$40.00 per hour is reasonable and current within the area of practice of Appellants' counsel. Where such testimony exists unrebutted, it is an abuse of discretion on the trial court to reduce the \$800.00 to the sum of \$500.00, particularly where Appellants Laub should recover more than \$19,000.00 in damages from Respondent Vere Beckstrom and Elizabeth S. Beckstrom, in addition to termination of all duty on the part of Appellants Laub to continue making payments under the land sales contract. The facts and circumstances of this case show that Appellants Laub should be awarded the sum of \$800.00 for the use and benefit of their counsel, \$800.00 being more than reasonable for bringing a case of this nature through trial.

#### POINT IV

APPELLANTS LAUB ARE ENTITLED TO AN ORDER OF THIS COURT AWARDING APPELLANTS ATTORNEY FEES ON APPEAL.

The Utah Supreme Court has held that attorney fees

on appeal are discretionary. State v. Shonka, 279 P.2d 709, 3 Utah 2d 121 (1955). Neighboring jurisdictions deem attorney fees allowable on appeal. Amos Flight Operations, Inc. v. Thunderbird Bank, 540 P.2d 1244 (Ariz. 1975); San Luis Obispo Bay Properties, Inc. v. Pacific Gas and Electric Company, 104 Cal.Rptr. 733, 28 Cal.App.3d 556 (1972). In view of the time involved in preparing and submitting this appeal, Appellants Laub reasonably request that this Court issue its order remanding this case back to the trial court to determine a reasonable attorney fee to be awarded Appellants' counsel for services provided on appeal.

### CONCLUSION

The trial court failed to follow the applicable rule of law with respect to damages in the instant case, probably because it erroneously assumed Appellants Laub breached a non-existent duty to conduct a title search. Applying the applicable rule, and using the uncontested and unrebutted figures in evidence as to the market value of the property at the time of breach of contract, and the uncontested, unrebutted figures as to the amounts of principal and interest owing on the contract, it is clear that this matter should be remanded to the trial court for entry of judgment in favor of Appellants Laub and against Respondents Vere Beckstrom and Elizabeth S. Beckstrom in the amount of \$19,767.13. Such award will allow Appellants Laub to obtain the benefit of their bargain, of which they were deprived by the trial

court's error.

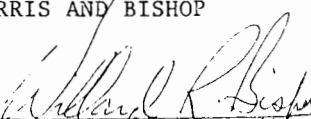
Attorney fees are a tool of justice. The trial court abused its discretion when it failed to allow Appellants Laub the sum of \$800.00 in the nature of attorney fees, when the unrebutted and uncontested testimony was that the fair and reasonable value of services supplied by Appellants' counsel was the sum of \$800.00.

Substantial time and effort is involved in the preparation and conduct of an appeal. The Court should remand this matter to the trial court for determination of a reasonable attorney fee to be allowed Appellants Laub for the use and benefit of their counsel in connection with this appeal.

DATED: 11 August 1977.

Respectfully submitted,

MORRIS AND BISHOP

By   
Attorneys for Appellants  
P. O. Box 279  
Cedar City, Utah 84720  
Telephone: 586-9483