

1986

# Gene Gray vs. David Foster and Adrian Garritsen: Brief of Defendant and Appellant

Utah Supreme Court

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DOCKET NO. 860042 IN THE SUPREME COURT  
OF THE STATE OF UTAH

...00000000...  
 GENE GRAY, an individual,  
 Plaintiff/Respondent,  
 vs.  
 DAVID FOSTER, an individual,  
 Defendant,  
 and ADRIAN GARRITSEN, an individual,  
 Defendant/Appellant.  
 ...00000000...

Case No. 860042-CA 20046

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY  
HONORABLE PHILLIP R. FISHLER

NOLAN J. OLSEN  
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Midvale, Utah 84047  
Attorney for Defendant Foster

**FILED**  
SEP 14 1984

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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GENE GRAY, an individual,	)	
Plaintiff/Respondent,	)	
vs.	)	Case No. 20046
DAVID FOSTER, an individual,	)	
Defendant,	)	
and ADRIAN GARRITSEN, an individual,	)	
Defendant/Appellant.	)	

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BRIEF OF DEFENDANT AND APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY  
HONORABLE PHILLIP R. FISHLER

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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GENE GRAY, an individual,	)	
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Plaintiff/Respondent,	)	Case No. 20046
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vs.	)	
	)	
DAVID FOSTER, an individual,	)	
	)	
Defendant,	)	
	)	
and ADRIAN GARRITSEN, an individual,	)	
	)	
Defendant/Appellant.	)	

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NATURE OF THE CASE

This is an action for breach of contract and fraud brought by Gene Gray against David Foster and Adrian Garritsen, both Defendants Counterclaimed against Plaintiff.

DISPOSITION IN THE LOWER COURT

Upon hearing the evidence and accepting the exhibits herein, the Honorable Philip Fishler, entered the following findings from the bench:

1. That Plaintiff was liable for fraud upon Defendant Foster, the latter to have Judgment over and against Plaintiff for \$5,000.
2. That Plaintiff was given Judgment against Defendant Garritsen for \$20,000.
3. The total effect of the decision was supposed to put the parties back where they started, (R-294 - 298).

### RELIEF SOUGHT ON APPEAL

By this appeal, Appellant Garritsen seeks reversal of that part of the lower Court's decision as it effects him.

### STATEMENT OF FACTS

On or about April of 1980 Respondent Gene Gray, pursuant to a certain agreement between himself and Defendant David Foster, advanced the latter the sum of \$10,000.00 in exchange for a promise to issue Foster one-half of certain stock in a future corporation, (R-138), subsequently entitled Traders Exchange, Inc. Said stock was not issued as agreed. From about September 1, 1981 through November 27, 1982 Appellant Adrian Garritsen was an alleged employee/agent of Respondent Gray. The terms and conditions of said employment/agency according to Appellant, were that Appellant was to receive ten percent of all accounts he collected for Respondent and in addition, fifty percent of all amounts received as a result of Appellant's efforts in marketing and selling certain products for Respondent (R-241). During said period Appellant testified he effected alleged collections in excess of \$50,000.00 and sold products in excess of \$25,000.00 (R-251). Contrary to said agreement, Appellant was not sufficiently compensated having received no more than \$1,000.00 (R-246). In January of 1982 Respondent Gray executed and signed a written agency agreement appointing Appellant to represent him in executing an exchange of stock in Traders Inc. for the conveyance of a certain duplex then owned by Defendant David Foster, and directing an assignment of title upon closing to Wall Investments, (Exhibit 2-D). Pursuant thereto, on the 10th day of February 1982, Respondent Gray executed and signed a letter of agreement assigning all interest in Traders Inc. to Defendant Foster, and in addition tendered to Foster a stock certificate in Grayco

Manufacturing Inc. representing same to have a book value of \$15,000.00, (Exhibit 5-P). This transaction was predicated upon the parties understanding that Foster had \$35,000.00 in equity in said duplex, and purported to be a complete release, accord and satisfaction between Defendant Foster and Respondent Gray. Thereafter, Respondent Gray requested Appellant to use his expertise and best efforts to secure certain mining claims, (R-224 - 227). Subsequent thereto Appellant located ten claims in Davis County and secured same in the name of Respondent at his request, (R-255). On November 26, 1982 both Respondent Gray and Appellant executed and signed a written agreement which, inter alia, acknowledged full satisfaction and receipt of said claims and released Appellant from any prior obligations between them. Said document purports to be, and was intended to be a "full and final settlement," (Exhibit 3-D). At trial Mr. Gray testified Appellant was indeed instructed to secure mining claims in his behalf, but testified Appellant had switched the claims, (R-49), but his testimony was inconsistent with the documentation and he contradicted himself several times regarding acceptance of same. Mr. Garritsen explained that there were two different sets of mining claims which he was looking into for Mr. Gray, (R-225), and further, that they were separate and distinct and Gray was well aware of the difference, (R-225 - 227). The first claim was known as the Bulkely claim and was available for much more money than Mr. Gray could afford, (R-226). Having been made aware of this Gray instructed Garritsen to obtain other mining property, referred to as the Gold Ridge claims, (R-227), and (R-233). Garritsen further testified that at all times he was working for Mr. Gray and that he in fact secured said claims for Gray and put them in his name so that Mr. Gray could put them into a corporation with Mr. Tom Adams, (R-234). Further, Garritsen testified that Gray knew that certain assessment work and road im-



provements had to be made or the claims would revert and become worthless, (R-226). In fact, said claims were indeed put in Mr. Gray's name, (Exhibit 14-P and 3-D). At no time was Garritsen authorized, instructed or under a duty to perform the assessment work, (R-229), and in addition, Mr. Gray was aware that he was obligated to do so. Garritsen testified that he spent approximately \$20,000.00 in securing said claims for Gray not counting his personal labor, which he valued at about \$1,500.00, (R-259). He also indicated that the value of the 10 claims when they were acquired was about \$50,000.00, (R-275). The evidence showed that those claims are now worthless because Gray failed to perform the assessment work, yet notwithstanding the trial Court held that "if that mining claim is worth \$20,000.00 that you found, or more, as you claim, then you are back where you started," (R-297), after awarding Garritsen the claims and Judgment against him in favor of Gray for that amount. In its findings on the record the Court did not address Mr. Garritsen's counterclaim against Gray for past employment, (R-295 - 298) however, in the Findings of Fact, Conclusions of Law and Judgment prepared by Mr. Dodd, attorney for Gray, (R-119 - 127) the Court no caused said counterclaim for the reason said "evidence was evenly balanced and therefore Garritsen had failed to carry his burden." The record is replete with affirmations of employment/agency, testimony as to the terms and conditions thereof and damages with reasonable certainty. The only controverting evidence was the testimony of Gray, who said "He's (Garritsen) never worked for me in 20 years." Yet Gray's very next statement, he said, "I told him I'd give him ten percent of anything he could collect or 25 percent of anything he could sell." (R-285). It is noteworthy that Gray kept all records in his possession and they were unavailable to Garritsen, (R-255).

## ARGUMENTS

### I

THE TRIAL COURT ERRED IN FAILING TO FIND AN ACCORD AND SATISFACTION, OR RELEASE BETWEEN RESPONDENT AND APPELLANT OR A WAIVER AND ESTOPPEL.

At trial the Court admitted Defendant's Exhibit 3-D (R-187) which is entitled a "Letter of Agreement," dated November 26, 1982 which Gene Gray acknowledged signing. Said document is also signed by Appellant. Although the document speaks for itself, it recites acknowledgement of receipt as and for consideration of the mining claims, describes same, incorporates Quit Claim deed thereto, and releases in full any obligation of Traders Exchange, Inc., Dave Foster, Adrian Garritsen regarding any prior investment therewith. It also recites an unqualified acceptance of the mining claims described as the Gold Ridge Group, as full and final settlement. It describes 10 claims and acknowledges their filing in Gray's name. The Exhibit also denotes the receipt of the file and specifies what it indicated.

There were no objections raised at trial regarding the authenticity of same or the validity thereof. Further, it is the original copy. It appears from its face to be the final embodiment of the parties last agreement.

The document itself states it is intended to be a release in full, and even further, as a full and final settlement.

This Court in a recent case, Hargan v. Industrial Design Corp., 657 P.2d 751 (Utah 1982), speaking through Justice Stewart, stated:

A release is a type of contract and may generally be enforced or rescinded on the same grounds as other contracts. E.g., Coulter, Inc. v. Allen, Wyo., 624 P.2d 1199, 1203 (1981); Westfall v. Motors Insurance Corp., 140 Mont. 564, 374 P.2d 96, 98 (1962). The law favors the amicable, good faith settlement of claims, Woods v. Gamache, 14 Wash.App. 685, 544 P.2d 144 (1975),

and the encouragement and preservation of such settlements "constitute strong arguments for enforcing releases," Witt v. Watkins, Alaska, 579 P.2d 1065, 1068 (1978). Generally, "(w)here an affirmative defense is stated, such as a valid release, which would defeat the cause of action, it is the duty of the court to grant a judgment based thereon." Ulibarri v. Christenson, 2 Utah 2d 367, 369, 275 P.2d 170, 171 (1954).

In the case at bar, as in the above case, Mr. Gray indirectly raised an issue of duress. He testified that he never read anything before signing but merely trusted others and that "I don't like to read or write," (R-194). In response to questioning by the trial Court Gray testified he had a 12th grade education and could read and write. Appellant testified that Gray had him type the documents because Gray didn't know how to type, (R-202). There was no evidence adduced at trial that Gray was under duress as defined by this Court at p. 783 in the above case wherein it was stated:

(1969). In Fox v. Piercy, supra, we defined duress as "any wrongful act or threat which actually puts the victim in such fear as to compel him to act against his will." 119 Utah at 373, 227, P.2d at 766. We reaffirmed this definition in Heglar Ranch, Inc. v. Stillman, Utah, 619 P.2d 1390, 1391 (1980), and we follow it in this case, not as a rigid rule based on precise elements that must be satisfied in every case, but as a general definition to be applied flexibly to the distinct facts of each case.

Nor was there any persuasive evidence that he didn't know what what he was signing, in his own words, "he trusted people." It is noteworthy in this regard that Garritsen was working for Gray and routinely typed such documents.

The facts of this case certainly demonstrate a sophisticated course of conduct in business affairs by Mr. Gray contrary to any such contention. Additionally he admitted signing the document.

Alternatively, the aforementioned exhibit can be viewed as a novation, or substituted contract, or an accord and satisfaction. As this Court observed in Bradshaw v. Burningham 671 P.2d 196 (Utah 1983); when addressing the issue specified at p. 198:

The dispositive issue is whether the parties' compromise agreement was a binding modification of their original contract or an executory accord. This distinction is important because of the different contractual rights available to the parties under each analysis. "Where . . . a modification is agreed upon, the terms thereof govern the rights and obligations of the parties under the contract, and any pre-modification contractual rights which conflict with the terms of the contract as modified must be deemed waived or excused." Rapp v. Mountain States Tel. & Tel. Co., Utah, 606 P.2d 1189, 1191 (1980) (citations omitted).

If, therefore, the compromise agreement was an amendment to the original contract, it will, in conjunction with those terms of the original contract it does not contradict, create a substitute contract and thereby extinguish any rights under the original contract now defined by the amendment. See generally 15A Am.Jur.2d Compromise and Settlement Subsection 3, 36 (1976).

In this case Mr. Gray gave up the right to proceed against the other parties in consideration of his receiving the mining claims he requested (R-227). The terms of the agreement do not necessarily contradict those of his original agreement with Appellant, nor those of Foster when considering the stock transfer to Foster (albeit fraudulent) and the funds retained by Appellant to secure the claims.

It was recognized in the Bradshaw Case, *supra*, that a novation "extinguishes any rights under the original contract . . . ." Therefore said agreement should have precluded and barred the instant action with respect to Appellant. Or, alternatively operate as a waiver of any right Gray theretofore had against Appellant and estop him from bringing said actions

as a matter of law. see: Sugarhouse Finance Co. v. Anderson 610 P.2d 1369 (Utah) (1980).

Arguably if the document is construed as an executing accord, satisfaction would be in Appellant's forbearance to sue. see: Christenson v. Abbott, 595 P.2d 900 (Utah 1979); Cannon v. Stevens School of Business, 560 P.2d 1383 (Utah 1977); Phillips Petroleum Company v. Hart, 480 P.2d 131 (Utah 1971).

## II

THE TRIAL COURT ERRED IN AWARDING EXCESSIVE DAMAGES TO PLAINTIFF FROM APPELLANT AND IN NOT FINDING FOR APPELLANT ON HIS COUNTERCLAIM.

After hearing this matter the trial Court attempted by its Judgment to place the parties back to their original positions, (R-160). In so doing, the Court gave Judgment to Gray for \$25,000.00 against Appellant, and gave Appellant the mining claims. Testimony adduced at trial from Appellant Garritsen regarding the value of said claims was not contested.

Garritsen testified that at the time he gave them to Gray they were worth about \$50,000.00. Said opinion was later stricken as being based upon improper opinion and hearsay, (R-251). He further testified that the cost of procuring the claims for Gray was approximately \$20,000.00, not counting his time which he valued at \$1,500.00, (R-239, 240). Evidence was adduced that the claims were secured for Gray, at his request, (R-227), placed in Gray's name as owner, (Exhibit 14-P), and that Gray knew that the claims required annual assessment work and participation in the improvement of a road, (R-229). Appellant never had the right, duty, obligation or opportunity to complete such work, nor was he aware that he should, (R-230).

Gray, the owner of the claims failed to perform the required work on subject claims and they reverted to Bulkleys thereby rendering them worthless and without value at time of trial.

On rendering its findings the Court indicated, after giving Gray Judgment against Garritsen for \$20,000.00 (later changed to \$25,000.00) that: "Mr. Garritsen, if that mining claim is worth \$20,000.00 that you found, or more, as you claim, then you are back where you started," (R-397), and gave Garritsen all right, title and interest in the claims.

Clearly the Court discerned that the claims still had value, not withstanding Gray's failure to complete the assessment work. Such an award obviously rewards Gray for his failure to maintain said claims at the direct expense of Garritsen.

This Court has consistently held that damage awards must result from justice and reason, and not be unrealistic or unreasonable. First Security Bank of Utah v. J.B.J. Feedyards, 653 P.2d 591 (Utah 1982); and "that the proceedings at trial were regular and proper and that the judgment was supported by competent and sufficient evidence," Bevan v. J.H. Construction Co. Inc., 669 P.2d 442 (Utah 1983). Moreover, in the Bevan case this Court went on to state at p. 444 . . . .

" . . . the general rule of damages which arms the trial court with the discretion to place the litigants as nearly as possible in the position<sub>3</sub> they would have enjoyed had the contract not been breached. Furthermore, the subject damages arose fairly and reasonably from the breach of contract, and they may reasonably be supposed to have been within the con-<sub>4</sub>templation of the parties at the time they made the contract, and when adequately proven, said damages clearly fall within the purview of this Court's decision in Wagner v. Anderson . . . ."

In this case the affect of the damage award id to charge the Appellant \$25,000.00 for merely doing what he was told to do by Mr. Gray,

and further unjustly enriching Gray for defaulting on his mining claims. Such an award in this case appears arbitrary and capricious, also see Cox Corporation v. Duggen, 583 P.2d 96 (Utah 1978).

Appellant further submits the trial Court erred in not awarding him damages from Gray as a result of his employment. Even Mr. Gray admitted Appellant worked for him on a percentage basis predicated on collections and sales, (R-241). There exists conflict in the records as to whether the percent of sales to be paid Appellant was 50 percent (according to Appellant) or 25 percent (according to Gray). There was no dispute that Appellant was to receive 10 percent of the accounts receivable he collected.

Appellant testified that he sold approximately \$25,000.00 worth of goods and effected collection of approximately \$50,000.00 for Mr. Gray, (R-251), in some detail. Gray generally denied this but failed to produce the records kept in his possession.

The trial Court did not rule on this issue from the bench but completely ignored said issue (as raised by Appellant's counter claim) until it signed the Findings of Fact, Conclusions of Law and Judgment submitted by Plaintiff's counsel.

Appellant contends the evidence regarding same preponderated in his favor and requests this Court to remand the matter for determination of damages and appropriate instructions.

#### CONCLUSION

In view of the foregoing, Appellant respectfully requests this Court for an Order reversing the trial Court's Judgment awarding Gene Gray \$25,000.00 from Appellant, returning any such interest in said mining claims

to Gray, and an Order remanding that part of the case regarding the alleged employment claim by Appellant for a determination of damages with instructions.

Respectfully submitted this 13th day of September, 1984.



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CERTIFICATE OF DELIVERY

I hereby certify I personally delivered two (2) true and correct copies of the foregoing BRIEF OF APPELLANT to the following:

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this 14th day of September, 1984.

