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Ranch Homes , Inc. v. Greater Park City Corporation : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RANCH HOMES, INC.,

Plaintiff and Respondent

vs.

GREATER PARK CITY, CORPORATION

Defendant and Appellant

Appeal

IN THE SUPREME COURT OF THE STATE OF UTAH

RANCH HOMES, INC.,)

Plaintiff and Respondent,)

vs.)

Case No. 15467

GREATER PARK CITY CORPORATION,)

Defendant and Appellant.)

RESPONDENT'S BRIEF

Appeal from a Judgment of the District Court
Of Salt Lake County

Honorable James S. Sawaya, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

RANCH HOMES, INC.,)

Plaintiff and Respondent,)

vs.)

Case No. 15467

GREATER PARK CITY CORPORATION,)

Defendant and Appellant.)

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action for damages for breach of contract.

DISPOSITION IN LOWER COURT

After a trial, the court entered judgment in favor of plaintiff for the sum of \$42,587, with interest thereon from May 1, 1975, in the amount of \$6,196.12, for a total judgment of \$48,783.12, plus plaintiff's costs of \$655.30.

RELIEF SOUGHT ON APPEAL

Respondent, Ranch Homes, Inc., seeks affirmance of the judgment of the trial court.

STATEMENT OF FACTS

Ranch Homes, Inc., is a closely held Utah corporation formed in the summer of 1974 by James D. Fahs, Jr., G. Michael Tuckett and Grant S. Kesler. Prior to their association in

Ranch Homes, Fahs had been employed by appellant, Greater Park City Company ("GPCC"), designing condominiums, doing subdivision layouts, managing construction, and preparing feasibility studies for housing in the Park City area (R 590); Tuckett had been a GPCC project engineer (R 674); and Kesler had been in private law practice in Salt Lake City.

Robert W. Wells was employed by GPCC from 1971 through 1975, and was its executive vice-president for the last three of those years (R 746). As early as December, 1973, while both Fahs and Wells were with GPCC, the two traveled to California together (R 591), and during that trip Fahs discussed with Wells the fact that he and his associates wanted to develop a residential subdivision in Park City that would be primarily composed of approximately 103 to 105 lots on a 30-acre parcel of property. At that time Fahs told Wells that he believed there was a tremendous market for an FHA-approved type of subdivision with FHA insured loans.

During the next 5 to 6 months Fahs and Wells carried on negotiations, discussing at various times what Fahs and his associates were proposing (R 592). September 3, 1974, after Fahs and Tuckett had left GPCC and had formed Ranch Homes, the two companies entered into a contract, titled "Option Agreement" (Exhibit 2) under the terms of which Ranch Homes

paid GPCC \$10,000 for an option to purchase approximately 30 acres in the Holiday Ranch area, adjacent to GPCC's own planned development of housing, equestrian trails, a golf course, a tennis center and other improvements (R 594, Exhibit 3).

The contract was not a typical option. It consisted of 16 pages of terms and conditions, many of them relating specifically to the development planned by Ranch Homes.

In addition to describing the property, establishing the purchase price, and providing the date and method for exercise of the option, the contract permitted Ranch Homes to receive conveyances of 10-acre parcels of property upon the payment by Ranch Homes of the per acre price (Ex. 2, ¶16). It provided that the property would be utilized as the site for the development, construction and utilization of no more than one hundred and five single-family residential home sites and homes, and that for a period of twenty years, none of the option property could be utilized for any other purpose without GPCC's prior written consent (Ex. 2, ¶10). Ranch Homes and parties purchasing from it were not to construct any improvements, buildings or structures upon the option property without GPCC having first approved the detailed plans and specifications, and it was acknowledged and agreed by Ranch Homes that all decisions as to the acceptability or approval of such plans and specifications

would be in GPCC's sole and unrestricted discretion. In order to obtain such approval, Ranch Homes or the parties purchasing from it were to submit copies of proposed plans and specifications, and if GPCC did not approve the plan, it was to indicate the portions that it didn't approve, whereupon revised plans might be submitted.

Ranch Homes also agreed that the improvements, buildings or structures would be constructed in accordance with the plans and specifications approved by GPCC and that completed streets and utility installations would be subject to acceptance by GPCC as being constructed in accordance with said approved plan and specifications (Ex. 2, ¶ 11).

Ranch Homes and its authorized representatives were to have the right, prior to the exercise of the option, to enter upon the property for the purpose of examining and investigating it, though it was not to alter the surface of the property until it had exercised the option (Ex. 2, ¶ 12).

GPCC acknowledged its intention to construct an 18-hole golf course in the area and agreed that a designated area would not be used for any other purpose for a period of ten years (Ex. 2, ¶ 19).

GPCC agreed that if the option were exercised it would install or cause to be installed an eight-inch water line and an eight-inch sewer line extending from the trunk line

to the water and sewer system of Park City Municipal Corporation; underground electrical lines; a paved roadway to the boundary of the option property; and a drainage system. Construction of the road and utilities, a major undertaking, would have cost about \$500,000 (R 774), and GPCC agreed that in event of exercise of the option it would provide assurance in a form satisfactory to Ranch's construction lender that its obligation to install the utilities and roadway would be fulfilled (Ex. 2, ¶ 20).

Ranch Homes agreed that it would discharge all liabilities arising out of activities upon or in connection with the option property prior to the conveyance dates (Ex. 2, ¶ 24), and that in the event of construction prior to the conveyance dates it would furnish a payment bond to GPCC (Ex. 2, ¶ 25). Ranch Homes was to provide insurance, was to comply with all federal, state and local laws, regulations, rules and orders (Ex. 2, ¶ 26), and paragraph 29 of the contract contemplated that Ranch Homes might engage in presale activities, including execution of purchase agreements prior to the conveyance dates.

The option was to be exercised by giving written notice to GPCC on or before 5:00 o'clock p.m. on April 1, 1975 (Ex. 2, ¶¶ 2 and 3).

After the option agreement was entered into, it was necessary for Ranch Homes to perform a great deal of preparatory work to determine whether it would be to the company's

advantage to exercise the option and pay to GPCC the amount approximately \$500,000 over the next four years including \$50,000 within one month after exercise of the option. Accordingly, the company's officers set about developing the plans. At that time the property, which had recently been annexed by Park City, was unzoned, and the city was in the process of rewriting its entire zoning ordinance (R 594).

In order to achieve the zoning necessary to permit development of the property, Fahs, as president of Ranch Homes, Inc., met with the city's master plan committee to obtain approval of the cluster housing needed to develop 3.5 units per acre, this density being necessary to make the Ranch Homes plan work. The plan of Ranch Homes was approved by Park City in early 1975 and sent to the planning commission. Final approval by the city council was obtained in March or April 1975 (R 594).

It was also necessary for the company to obtain FHA approval of the project, which required preparation of final architectural drawings as a prerequisite to an FHA appraisal. The appraisal would permit the company to place a value on the houses. In the spring of 1975, Ranch Homes succeeded in obtaining an "ASP-9" feasibility letter from FHA (R 595-596).

While this was going on, Fahs was also negotiating with lending institutions, meeting with them repeatedly to arrange for financing of the subdivision (R 596).

Ranch Homes had to produce plans and specifications for the Federal Housing Authority for the project generally, including a floor plan, elevations, sections, and construction detail; type of concrete; the soil bearing pressure; lumber, shingles, and so forth. Feasibility studies were needed for Park City, for the Federal Housing Authority, and for financing institutions (R 597). For FHA approval it was necessary to prepare a certified soil survey. Tuckett prepared plans for off-site improvements, including 30 sheets of drawings for road profiles, sewer, water, and curb and gutter. The cul-de-sac design required more engineering in order to obtain city approval (R 598).

Ranch Homes was told by the lending institutions that the lenders would need assurances that the road and utilities promised by GPCC would in fact be built (R 607, 608). Fahs requested the assurances from Wells (R 610), but was told that GPCC wasn't going to build the road and utilities (R 611). The parties attempted to work something else out. Various meetings were held and various proposals were made by GPCC (R 612), but the assurances were never received. On April 1, 1975, prior to 5:00 o'clock p.m., a letter exercising the option was delivered to GPCC and in accordance with the terms of the contract, closing of the transaction was set for April 30, 1975 at 10:00 o'clock a.m. (Ex. 1). Ranch Homes continued in its attempts to obtain the assurances. The

officers were sent by GPCC to Los Angeles to talk with Don Prell of Union America, Inc., the company that was to own Holiday Ranch after a reorganization then in progress (R 614).

Ranch Homes never did receive any assurances that the roadway and utilities would be built, but were told by GPCC and by Don Prell that they would not be built. Accordingly, when the time for closing the transaction arrived on April 1, 1975, Ranch Homes relied upon GPCC's manifestation that it was not going to perform and did not attempt to close the transaction (R 615).

In reliance on its contract with GPCC, Ranch Homes spent \$27,587, including \$2,587.39 advanced by a related corporation in which the Ranch Homes principals were involved (R 599-603, Exhibits 5 and 6). In addition, the officers of Ranch Homes performed other valuable services for which they expected to be paid (R 627-677). There was testimony that the services performed by Fahs were worth \$17,500, over and above the compensation he had received from Ranch Homes (R 628), and that the value of the plans and specifications prepared by Tuckett, for which he had not been paid, was \$26,000 (R 676).

The case was tried twice, once to a jury and once to the court. In the first trial the jury returned a verdict in favor of plaintiff for \$27,587 out-of-pocket expenditures and \$16,000 lost business profits, the court having refused

to submit to the jury the question of the value of services performed by corporate officers (R 92). On appellant's motion, the court granted a new trial. At the beginning of the second trial, the court ruled that the value of the services of corporate officers were recoverable, but that anticipated profits were not. After the trial, the court found that Ranch Homes had spent the sum of \$27,587, and through its officers had performed services of a value of \$15,000 in reasonable reliance on the contract. It entered judgment accordingly with interest and costs.

Other facts relating specifically to the points raised by appellant will be discussed in the arguments to which they are germane.

ARGUMENT

I

Plaintiff's expenditures were reasonable, were made in reliance on the contract, and were foreseeable at the time the contract was made.

We have no quarrel with the rule of foreseeability as it relates to the determination of damages for breach of contract. The rule has been stated with minor variations since its pronouncement in 1854 in the landmark case of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract

should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of contract, which they would contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. * * *

The rule is adopted in substance by Restatement of Contracts, § 330, which provides:

In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.

In Pacific Coast Title Insurance Company vs. Hartford Accident and Indemnity Company, 7 Utah 2d 377, 325 P.2d 906, 907 (1958), the rule is stated by this court as follows:

The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable foreseeability that loss of such general character would result from the breach. Therefore, to be compensable, the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had adverted to breach when the contract was made, loss of such character would have been within their contemplation. [emphasis added]

Although we don't quarrel with the rule, we do quarrel with the appellant's tortured application of it, with the

insistence that the opinions of its experts were controlling, with the disregard of contrary evidence, with the attempt to shift its burden of proof to the respondent, and with the treatment of fact issues as if they were law issues.

In its litany of expenditures that were not "foreseeable and reasonable," the appellant has not considered the general character of the losses which would likely result from its breach of contract, but only fragments of specific items of damage. It has also disregarded those portions of the testimony and the terms of the contract from which the court could (and properly did) find foreseeability.

The appellant has treated the contract in this case as if the only pertinent part was the title. But as pointed out in the statement of facts, the agreement was not only an option, it was a definitive contract relating to the development of the 30 acres of property in Park City, and the entire contract, including the seven months lead time between granting of the option and the date for its exercise, shows knowledge upon the appellant's part that Ranch Homes was going to proceed with its plan for the development of the property.

Before the contract was entered into, Fahs and Robert Wells of GPOC had discussed the plans for the property. Mr. Fahs testified (R 592):

I discussed with Mr. Wells the fact that we wanted to develop a residential subdivision in Park City that

would be primarily composed of approximately 103 to 105 lots to a 30-acre piece of property. We discussed various locations as to where we thought the best one was. We also expressed to him that we felt that there was a tremendous market for an FHA approved type of subdivision with providing FHA insured loans in that community and we thought it would be a success and basically our negotiations revolved around that for the next five to six months discussing at various times what we were proposing, the fact that he wanted it to have some control and oversee what our plans were and approve them prior ahead of time so that we were constructing something in the Holiday Ranch that would be an asset to the Ranch as opposed to something that would be detrimental.

The contract itself contemplated planning. Ranch Homes was to be permitted to enter the property before exercise of the option and to make measurement. The property was to be utilized for development of approximately 105 single family residential home sites and homes. Plans were to be submitted to GPCC. GPCC was to install or cause to be installed a roadway and utilities, and "on or before the closing date" it was to provide Ranch Homes a flow line elevation and the location of the eight-inch sewer line. It was to provide assurances as to completion of the roadway and utilities by evidence satisfactory to Ranch Homes's construction lender prior to the closing date. And Ranch Homes had the right to engage in presale activities, including the execution of purchase agreements, prior to the time that any conveyances were made.

In its "ten-point must not" argument beginning at page 5 of its brief, the appellant challenges a number of specific

items it believes were improperly allowed as damages.

The first item refers to expenditures "incurred prior to execution of the Option Agreement." This seems to be tied to the argument found on pages 9 and 10 of appellant's brief that Kesler was paid \$2,500 for legal work that had included services rendered prior to the execution of the option agreement. But Kesler testified that the value of services performed after execution of the contract was \$2,500, the amount received (R 689). There may also be some complaint that part of the \$17,500 claimed for Fahs's managerial services involved time spent before the contract was entered into. If so, it may be presumed that the trial court took this into account. The respondent's evidence was that services performed by Fahs and Tuckett in reliance upon the contract were valued at \$43,500, but this was reduced by the trial court to \$15,000.

The second item refers to expenditures incurred "prior to plaintiff's exercise of the option on April 1, 1975." Appellant's complaint about these expenditures is somewhat vague, and we assume that the theory is that damages are not allowable for a period prior to exercise of the option because there was no contract. But as will be shown in Point II of the argument, relating to the measure of damages, reliance damages were properly awarded.

Items 3 through 7 relate to specific expenditures of

plaintiff in preparation of plans and development of the subdivision. The appellant again makes the mistake of ignoring the fact that the damages need only be of the "general character" foreseeable by the parties. The specific items were all within the general character of damages that might of have been expected, viz., expenses for preparation, planning, development, obtaining financing, and arranging sales, for the subdivision.

The eighth item refers to "expenditures incurred in the incorporation of plaintiff and in the drafting of a prior limited partnership agreement," which must be a restatement of Item No. 1. The statement refers to services of Kesler, but the respondent's evidence is that these services were not included in the \$2,500 paid to Kesler.

The ninth item refers to expenditures incurred in the "drafting of final architectural and engineering plans for all phases of development notwithstanding the fact that only Phase I was to be completed in 1975, and incurred before exercising the option, before receiving FHA approval and before a construction loan was approved." In this connection Fahs testified that final architectural drawings had to be prepared in order for the FHA appraiser to place a value on the homes, and that this was necessary to obtain financing for construction of the subdivision (R 596). Although it

was the plan of Ranch Homes to do the subdivision in three phases, it was necessary to do the engineering for the entire project in order "for everything to work" (R 682).

The tenth item refers to "expenditures incurred for all of the above items even though, as plaintiff finally testified at the conclusion of the Second Trial, a purchaser could have bought a lot from plaintiff and built his own house upon it without using plaintiff's plans!" This complaint is based upon a single sentence of Fahs among a multitude of paragraphs, which referred to one of many projections. The appellant sees more significance in it than is warranted by the testimony. Fahs testified that it was the company's plan to develop 32 lots, build a model complex in the cul-de-sac, with four or five model homes, and presell the homes from the models. On cross-examination appellant's counsel asked whether a buyer would be required to build a Ranch Home house or could buy a lot. The testimony went like this:

Q. I see. So then you would have been willing to just sell 32 lots and not build houses?

A. Oh I think we -- we -- we had that as -- in the back of our minds --

Q. I see.

A. (Continuing) -- but when we went into the project --

Q. And this subdivision is a part is it not -- the first 32 or a part of the one hundred four lot subdivision are they not?

A. That's correct.

* * *

MR. PRINCE: I am really confused. I have been operating under the assumption through a deposition and through a complete trial that this gentleman was going to build thirty-two homes in accordance with the plans and specifications that he put out and now all of a sudden he is going to put out thirty-two lots and let people buy the lots and I am really astounded. I mean, I am really astounded to hear that we are not talking about selling homes completed for fifty-five thousand any more and the FHA commitment doesn't mean anything because we are not -- because this was based on those plans and those specifications and we are not talking about any particular plan of a house. I am absolutely astounded. I would like to -- I would like --

THE WITNESS: Sir, thats wrong. I didn't say that.

* * *

THE WITNESS: I said to you from the outset and I always -- my testimony has always been that in order to make this project work you have a land loan that you must record on the property and you must develop thirty-two lots and we always had the intention of building a model complex of five houses and the rest of the houses on that development would be built as they were pre-sold. It was a requirement of the loan and in order to -- to be able to get that land loan and in order to be able to develop even five spec houses and cul-de-sacs for a model complex, it was necessary to prepare architectural plans which were processed through the FHA, received a valuation so that the lender knew what the value of that home was so he might loan on it and my testimony has been that way.

The testimony shows that the appellant's concerns are unwarranted, except to the extent that losers' concerns are always warranted.

The itemization used by appellant demonstrates the worth of this court's view that only the general character

of the damages need have been foreseeable. And this view is supported by other authorities. In 5 Corbin on Contracts, § 1012, we find the following:

Just as reason to foresee does not mean actual foresight, so also it is not required that the facts actually known to the defendant are enough to enable him to foresee that his breach will cause a specific injury of a particular amount in money. If he knew that his breach would cause the shutdown of a mill, he had reason to know that his breach would prevent the sale of its product at market prices. It is not required that he should be able to foresee just how many articles would be sold, or to what specific persons or at what exact prices they would be sold. What is required is merely that the injury actually suffered must be one of a kind that the defendant had reason to foresee and of an amount that is not beyond the bounds of reasonable prediction.

The appellant seems to treat the question of foreseeability as if it were a question of law, rather than a question of fact which was decided against it.

In Holt Manufacturing Co. v. Thornton, 136 Cal. 232, 68 p. 708 (1902), the appellant argued that the question of whether high winds that had led to increased losses were "within the contemplation of the parties" should not have been submitted to the jury but should have been determined by the court. The Supreme Court of California said:

In McMahon v. Field, 7 Q.B. Div. 591 Brett, L.J. speaking of these three questions: "First, whether the damage is a necessary consequence of a breach; secondly, whether it is the probable consequence; and thirdly, whether it was in the contemplation of the parties when the contract was made," -- said: "Those two last are rather questions of fact for a jury, than of law for the court, to determine." The foregoing cases are in

accord with the weight of authority on the subject, and express the principle that should be applied to the particular facts of the case at bar.

This view is supported by the other cases and by text writers on damages and contracts. In McCormick on Damages (Hornbook Series), p. 574, we find the following:

If men could reasonably differ over the objective facts relative to the giving of notice, or over the question whether, on the facts thus found, the defaulter should, when the contract was made, reasonably have foreseen that such a loss as this would be the result of breach, then these questions of fact and the inference are to be submitted to the jury.

There is agreement in 5 Corbin on Contracts, § 1012:

The question whether or not the defendant did in fact foresee, or had reason to foresee, the injury that the plaintiff has suffered is a question of fact for the jury, subject to the usual supervisory power of the court. * * *

In support of its contention that the costs incurred by Ranch Homes were unforeseeable and unreasonable, appellant relies almost entirely upon (1) ipse dixit and (2) the testimony of Mr. Herbert Trayner, a subdivider and general contractor who was presented to the court as an expert. The ipse dixit we can meet with ipse dixit of our own, and the testimony of Trayner we can meet with the recognition that it is only an opinion. In Byram v. Payne, 58 Utah 536, 201 P. 401, 404 (1921), the defendant in an action for injury to sheep while aboard a common carrier contended that the testimony of an expert as to the cause of death of the sheep should have been as conclusive. In affirming a contrary

judgment by the trial court, this court said:

Possibly the jury failed to give to the testimony of these expert witnesses the weight to which it was entitled, but the weight of testimony, including that of expert witnesses, is wholly a subject for the jury's determination. Doubtless the defendant presented a strong defense, but it is evident from their verdict that the jurors believed the sheepmen and farmers and doubted or rejected the testimony of the veterinarians and biologists. It is not within the province of an appellate court to pass upon the evidence and say that the opinion of the jury was wrong.

Accord, 31 Am. Jur 2d, Expert and Opinion Evidence, § 183.

The trial court in our case heard the qualifications of appellant's expert and listened to his testimony. The court also listened to the testimony of Ranch Homes's witnesses, including persons who were trained in architecture, engineering, and the development of subdivisions, and who had, in fact, been employed for a substantial period of time by the appellant itself.

One difficulty with Mr. Trayner's testimony is that his experience was geographically remote. He had done work in Salt Lake County and in counties to the north and south, but had not done any development work in Park City. He was not familiar with the zoning ordinances there. He did not know what was necessary to accomplish a change in zoning there. His testimony as to what expenses were reasonable and what ones were not is entitled to little weight.

Moreover, Trayner's testimony supports the view that damages of the general character claimed by Ranch Homes were

foreseeable. He testified that the length of time for an option to run generally would be based on what had to be done in order to develop the property; that certain things had to be worked out before a purchaser would know whether he would want to buy the property (R 887). After obtaining the option and before exercising it it would be necessary for a builder to go through various steps. The first step is to arrange for the proper zoning (R 869), in connection with which it would be necessary to show the ownership of the property, the density picture, the number of units per acre, whether the development will be residential, single-family, multi-family, commercial or whatever; preparation of a preliminary layout showing the configuration to which the land is to be put; and work on obtaining a commitment from a lender (R 874). He also testified that it was advantageous to have FHA approval.

The things he was talking about in his testimony are the kinds of things that Ranch Homes did, and they are the kinds of things that were contemplated by the contract and by the negotiations that preceded it. On the basis of all of the evidence, the trial court properly found -- as a fact -- that the damages were foreseeable (R 166).

It is submitted that it was the duty of appellant to show that the costs incurred by Ranch Homes were not reasonable. A landmark case dealing with the measure of damages

for breach of contract is United States v. Behan, 110 U.S. 338, 4 S. Ct. 81, 28 L. Ed. 168 (1883), in which the United States Supreme Court said:

It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own service), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

The appellant attempted to show that the expenditures of Ranch Homes were extravagant and unreasonable, but it relied upon a witness who was unfamiliar with developments in Park City, and the court was not bound by his opinion.

There are thousands of cases dealing with the foreseeability of damages resulting from breach of contract. Each of the cases is different, and each is decided, in large measure, by the wording of the contract and the special circumstances communicated to the defendant. Many of the cases cited by the appellant relate to consequential damages which were highly unusual in light of the nature of the contract entered into. Ours is not such a case.

The expenses incurred by Ranch Homes are not "collateral," as argued by the appellant. The contract provided for the purchase and the development of the 30 acres of property

owned by GPCC, and Ranch Homes was obligated to use the property for the development of a subdivision of 103 to 105 houses, with plans and specifications to be presented to an approved by GPCC. The things that were done by Ranch Homes were all done in furtherance of that contract.

That damages of the type sought by Ranch Homes are recoverable is also shown by the cases cited in Point II of this brief, though the Points I and II are necessarily interrelated and should be considered together.

II

The proper measure of damages in this case consisted of expenditures made in performance of and in reliance upon the contract plus provable lost profits.

A leading and often cited case dealing with the measure of damages for breach of contract is United States v. Behan, supra, 110 U.S. 338, 4 S. Ct. 81, 28 L.Ed. 168 (1883), which involved a government contractor who had expended money and services in reliance upon a contract with the United States. Before complete performance, the contract was terminated by the government, and in discussing the measure of damages for the breach, the court said:

The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he

has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract.

The court noted that it is not always possible to recover for loss of profits, because they may be too remote and speculative in character, but pointed out that the failure to prove profits will not prevent the party from recovering his losses for actual outlay in expenditures.

The court added that the party who voluntarily and wrongfully puts an end to the contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.

The relationship between the rule permitting recovery of out-of-pocket losses and recovery of anticipated profits is explained in 5 Corbin on Contracts, § 1031:

It is often very difficult to estimate the amount of profits that have been prevented by the breach of contract not only because of uncertainty in the happening of a various contingencies, but also because of difficulty in determining the money value of a promised performance or the cost of completion by the plaintiff. There is usually little difficulty, however, in proving what has already been expended by the plaintiff prior to the date of breach by way of preparation and part performance. The fact that profits are too uncertain for recovery does not prevent a judgment in favor of the plaintiff for the amount of his expenditures.

* * *

The present rule allowing the recovery of expenditures is not an alternative rule that may be applied only in the cases where profits are too uncertain for recovery. There are very many cases in which judgment has been

given for both the profits and the amount of the expenditures. It is entirely proper to do this, provided that sufficient care is taken to avoid giving a double recovery for the same element of harm. A judgment for profits, when that term is properly used, never includes any of the plaintiff's expenditures in preparation or part performance. The cost of full performance by the plaintiff always includes these expenditures; and this total cost must be subtracted from the contract price in order to determine the amount denominated as profits. It follows that in addition to "profits" so computed the plaintiff is always entitled to the amount of expenditures that would have been reimbursed by the performance promised by the defendant before any "profits" would begin.

In § 1032, Professor Corbin adds:

The rule in the preceding section must not be limited to expenditures in the form of payments in money. If the injured party has, in the course of performance or in the preparation therefor, transferred or consumed property or has performed work and labor of value, these may be estimated and included along with his cash outgo.

In Holt v. United Security Life Insurance & Trust Co., 76 N.J.L. 585, 72 A. 301 (1909), the plaintiff was awarded damages for expenses incurred in reliance upon an agreement by the defendant to make a loan. The loan was for the purpose of permitting the plaintiff to complete a purchase of real property, remove the house from the property, and construct a new building on the property. In reliance on the contract, the plaintiff sold the frame building that stood on the land and proceeded to make contracts with various parties for the furnishing of materials and doing of construction work on the new building. While the work was in progress, the defendant notified the plaintiff that it

was not going to make the loan. On the question of damages, the New Jersey Court of Errors and Appeals said:

Losses directly incurred, as well as gains prevented, may furnish a legitimate basis for compensation to the injured party. And, among such immediate losses, expenditures fairly incurred in preparation for performance or in part performance of the agreement, where such expenditures are not otherwise reimbursed, form a proper subject for consideration where the party injured, while relying upon his contract, makes such expenditures in anticipation of the advantage that will come to him from completed performance. Where the profits that would have been lost are shown with such certainty as to entitle the plaintiff to damages under this head, we do not mean to say that he may have recovery for his preliminary outlay in addition; for this would seem to involve a double recovery. But where one party repudiates and thus prevents the other from gaining the contemplated profit, it is not, we think, to be presumed in favor of the wrongdoer (in the absence of evidence) that complete performance of the agreement would not have resulted in at least reimbursing the injured party for his outlay fairly made in part performance of it.

There is no reason why the general contract rule allowing reliance damages should not apply to contracts or options for the sale of real property, and the rule has been so applied.

Kammert Bros. v. Tanque Verde Plaza Co., 102 Ariz. 301, 420 P.2d 678 (1967), involved a contract for the sale of commercially zoned real estate near Tucson, Arizona. The seller breached the contract and the buyer was awarded damages for the breach. The court allowed both the benefit of the bargain and out-of-pocket expenses incurred in reliance on the contract. The out-of-pocket expenses for which recovery was permitted included principal and interest paid

on the contract of sale, taxes paid on the land, architectural fees, topographical map, soil tests, attorney's fees, accountant's fees, and travel expenses. In addition, the court allowed damages for loss of bargain in the amount of \$110,000.

In Mendoyoma, Inc., v. County of Mendocino, 9 Cal.App. 3d 193, 87 Cal.Rptr. 740 (1970), the county, having acquired a right to use certain lands of the United States for park and recreation purposes, entered into a written concession agreement with Mendoyoma, giving the company the right to construct buildings and improvements for the service of the public and to operate them for a profit. The county breached the agreement, and the court awarded reliance damages to the company, which award was upheld on appeal. The trial court, however, had refused to award any amounts to Mendoyoma for the time spent by officers of the corporation in endeavoring to perform. On this point the District Court of Appeals reversed, indicating that the claim was not directed to any compensation due the officers for their service, but rather to the compensation due the corporation acting through its officers. With respect to the denial of an award of \$14,237 for interest which Mendoyoma claimed because of a loan it took to finance the project, this was denied because the special circumstances surrounding the formation of the contract showed that it was the parties' understanding that

the project was going to be financed by risk capital and not by a loan. It was not because the expenditure was "collateral" as suggested in appellant's brief, page 17.

In Cain Shoes, Inc. v. Gunn, 194 Kan. 381, 399 P.2d 831, 834 (1965), the parties had entered into a lease agreement for property on which plaintiff planned a shoe store. The owner of the property failed to build the building in which the store was to be operated and the lessee sued for damages. The court said:

In determining what might reasonably have been contemplated, the nature and purpose of the contract, and the attending circumstances known to the parties at the time the contract was executed, should be considered.

* * *

It is a well established rule in this state that expenditures made in anticipation of, or in preparation for, the performance of a contract in which default is made or fulfillment prevented are recoverable (King Bros. v. Perfection Block Machine Co., 81 Kan. 809, 106 P. 1071).

It would appear quite probable that a party who leased space for a shoe store in a building to be constructed for occupancy on a particular date would order shoes in advance to be available at the opening date. It would also appear that shoes being seasonable, a serious loss would occur if the sales location was not made available. It would further appear probable that the interested parties would attempt to minimize the loss by finding a substitute location from which the shoes purchased in anticipation of the lease could be sold. These are matters which the trial court will give consideration under the facts and circumstances of the particular case when the new trial occurs.

In Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), action was brought for damages arising out of the failure to

give a dealer's franchise as promised. Applying equitable estoppel, the court held that the trial court was correct in holding the defendants liable for monies that the promisee had expended in preparing to do business under the promised dealer franchise, even though there was no enforceable contract.

See, also, Continental Plants Corp. v. Measured Marketing Service, Inc. 274 Or. 621, 547 P.2d 1368 (1976); Childress v. Cook, 245 F.2d 798 (5 Cir. 1957); and Brenneman v. Auto-Teria, Inc., 260 Or. 513, 491 P.2d 992,995 (1971), and cases cited therein.

Thus the cases support the proposition that for breach of contract, including those involving real property, the injured party may recover out-of-pocket costs as well as the benefit of his bargain. The out-of-pocket costs moreover, need not be in performance of the contract. As stated in Corbin on Contracts, § 1035:

There are many expenditures made in reliance upon an existing contract that cannot be properly regarded as having been made in part performance of it, or even as in necessary preparation for such performance. Such expenditures as these are not expected to be compensated directly by the payment or other performance promised by the defendant, for they do not constitute a part of the agreed exchange. Nevertheless, the net loss involved in such expenditures may be included in the damages awarded, if at the time the contract was made the defendant had reason to foresee that such expenditure would be made and that his own breach would prevent their reimbursement.

The cases dealing with breaches of contracts to sell real property, where the purposes of the purchase are not set out in the contract and are not shown to have been known to the vendor, have no bearing on the case presently before the court. Even those cases awarding only the difference between the value of the property at the time the purchaser was to have conveyance of it and the price he was then to pay, recognize that cases may arise where departure from this rule is permitted. In their brief, appellants recognize Neal v. Jefferson, 212 Mass. 517, 523, 99 N.E. 334, 41 L.R.A.N.S. 387, as such a case, but attempt to distinguish it on the ground that it involved a lease instead of a purchase and that profits and reliance damages may be the natural and probable result of the breach of a lease agreement. It is submitted that they may also be the natural result of the breach of a contract for the sale of real property, where the contract contemplates that the property is going to be developed, subdivided, and sold, particularly where the developer's plans were communicated to the defaulter.

Bunnel v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962), does not preclude the recovery of reliance damages. Although the court in that case mentioned that the measure of damages was the market value of the property at the time of the breach less the contract price to the vendee, there was no hint in the case that the out-of-pocket expenses were sought.

A different measure of damages was applied in the earlier case of McBride v. Stewart, 68 Utah 12, 249 P.114 (1926). There the court indicated that plaintiff could receive back what she had paid, noting that she had not elected to sue for profits or the value of the property.

The Utah cases on damages for breaches of real estate contracts were discussed in the recent opinion of Smith v. Warr, 564 P.2d 771 (Utah 1977), in which the trial court had awarded the buyer's out-of-pocket loss but denied her any benefit of the bargain damages, i.e., the market value of the property at the time of the breach less the amount of the unpaid purchase money. The issue was whether the benefit of the bargain could be awarded in the absence of a showing of bad faith on the part of the vendor, the parties and the court having been in agreement that out-of-pocket losses were recoverable. The court noted that in those cases in which benefit of the bargain damages had not been awarded, the buyers had only sought out-of-pocket losses. We have been unable to find any Utah case indicating that out-of-pocket losses cannot be recovered in case of a contract for the sale of real property.

On the basis of the foregoing, it is clear that the court applied the proper measure of damages -- or at least a measure of damages that was not prejudicial to GPCC. Ranch Homes took the position at the trial, and takes it now, that

in addition to out-of-pocket losses it should have been awarded the profits it would have made in the development and sale of the real properties being purchased from GPCC. The point is made here primarily to emphasize the fact that GPCC has had the benefit of two trials and has had applied to the case a damage rule that is to its benefit, since the award of \$16,000 loss of profits in the first trial was taken away from the respondent in the second trial.

The trial court's findings of reliance, reasonableness, and foreseeability were fully justified by the evidence. Under appellant's theory and the testimony of its appraiser, Ranch Homes wouldn't even be entitled to return of the \$10,000 it gave for the option, and might owe something to GPCC for preventing it from performing such a disadvantageous contract.

III

The evidence does not support appellant's contention that Ranch Homes failed to mitigate its damages.

Failure to mitigate damages is an affirmative defense as to which the appellant had the burden of proof.

In this case, GPCC attempted to show that Ranch Homes's damages could have been mitigated, producing evidence that during negotiations following the repudiation of the contract by GPCC, certain other properties were offered to Ranch Homes at varying prices. The proof of GPCC in this regard

fails in several particulars. The most important of them is that nowhere in the testimony is there any evidence as to how or to what extent the damages would have been mitigated if Ranch Homes had bought one of the parcels of property on terms offered to it by appellant.

The testimony of witnesses for Ranch Homes was that the damages, i.e., the out-of-pocket expenses, were incurred in developing the plans and specifications, obtaining zoning, and preparing the material for presentation to the FHA and to financing institutions for development of the 105 lots on the property under option. They also testified that the plans and specifications, architectural drawings, and engineering drawings that were prepared by them, in fact all of the work that was done by them had no value and could not be used for any other piece of property. But the defendants have merely thrown toward the court the possibility of some other pieces of property being acquired at a better price, suggesting that, since this is true, the respondent did not mitigate its damages. But there was no evidence as to what could have been done with the property, what profits might have been made, or how the purchase of other property would have aided the respondent in reducing the losses it had already suffered.

Besides, the proposals made were not advantageous to Ranch Homes. Fahs testified that the original alternative

that was proposed consisted of three 10-acre parcels comprising 30 acres for the price of \$10,000, and Ranch Homes made a counteroffer to purchase the property for \$8,000. It was Fails' opinion that the 30-acre parcel was not worth \$10,000 an acre, and that the work already done would not be useable on the substitute 30 acres (R 944). Other offers were made with respect to 56 acres, but after a meeting it was agreed among all of the parties that the proposal was not workable, and that they ought to try to do something else (R 944). Development of the 56 acres would have required Ranch Homes to borrow money against the property and construct the utilities that had been planned to be constructed by GPCC, which would have cost \$500,000 or so (R 947). This proposal fell through and the parties were never able to agree on it (R 944). As to another 58-acre parcel, the work previously done by Ranch Homes would have been of no use (R 947-948).

In addition to the fact that the appellant has failed to show how Ranch Homes' damages would have been mitigated by any of the proposals that were discussed, there are certain rules relating to mitigation of damages which defeat this defense.

The doctrine of mitigation as applied to contracts is more often referred to as the doctrine of avoidable consequences, and it is not as broad as appellant takes it to be.

As stated in 22 Am Jur 2d, Damages, § 33:

The innocent party is not required to take extraordinary efforts to avoid the losses from the breach of contract; nor is he expected to incur risks or spend substantial sums of money to protect the defaulter. Nor need he sacrifice a substantial right of his own in order to minimize his loss. All that is required of the non-defaulting party -- in measuring his damages -- is that he act reasonably so as not unduly to enhance the damages caused by the breach. If the court determines that he has not acted reasonably to avoid damages, the actual award of damages for the breach will be reduced by the amount which could have reasonably avoided.

It is also stated that "it is not necessary for the plaintiff to make another contract with the defendant who has repudiated, even though it offers terms that would result in avoiding loss." 5 Corbin on Contracts § 1043, p. 272. It was stated in Questo v. Durado, 136 Cal. App. 2d 332, 288 P.2d 529, 531 (1955), that

While it was the duty of defendant "to exercise reasonable care to minimize anticipated damages growing out of the breach of a contract" * * * it was not for him to assume the burden of the wrongdoer nor to incur relatively large expenses on that account.

In 22 Am Jur 2d, Damages, § 37, it is said that

Courts generally do not determine damages based upon the making of these expenditures unless (1) they are small in comparison to the possible losses, and (2) it is virtually certain that the risk incurred will avoid at least a part of the loss. Damages will not be decreased through showing that a substantial expenditure would have minimized the total loss or that the suggested expenditure may or may not have decreased damages. The defaulter is in no position to cast this risk of substantial expenditures on the plaintiff. Since such risks arose because of the breach, they are to be born by the defaulting party.

See, also, Double D Amusement Co. v. Hawkins, 20 Utah 2d 395, 438 P.2d 811, 812 (1968); Theis v. duPont, Glore Forgan, Inc., 212 Kan. 301, 510 p.2d 1212, 1218 (1973); and Restatement of Contracts, § 336, Comment a.

The only evidence offered by appellant on mitigation of damages was that it would have sold some other parcels of property to Ranch Homes for substantial sums of money. This would have required Ranch Homes to enter into a new contract with the defaulting party, put up substantial sums of money, and enter into some kind of a development that differed materially from what it had planned. Moreover, the efforts that they had already made and which were uncompensated would not have been paid for by the development. The appellant having offered no evidence as to the profit respondent might have made by accepting one of its propositions, there is no basis for determining what amount, if any, might be deducted from the damages awarded to Ranch Homes.

IV

Interest was properly added to the damages awarded to Ranch Homes.

In challenging the court's award of prejudgment interest, the appellant relies almost entirely on cases outside Utah. This is understandable, inasmuch as the law has been settled in Utah for 70 years that if the injury and consequent damages are complete, and the damages can be determined by a

fixed standard of value, rather than by the judgment of the trier of fact, prejudgment interest is allowable. This court has not been troubled by the "liquidated-unliquidated" dichotomy.

Appellant is correct in stating that the law of Utah with respect to prejudgment interest was established in the early case of Fell v. Union Pacific Ry. Co. 32 Utah 101, 8 P. 1003 (1907), but incorrect in its characterization of what Fell held.

That case involved a claim for damages resulting from the death of and injury to sheep shipped via the defendant railroad. The case contains an excellent discussion by Justice Frick as to the varying views on liquidated and unliquidated damages and the reason for allowing recovery when the injury is complete. The court rejected the view of some courts that interest shouldn't run against a defendant until he knows how much he should pay. It adopted the view that if the injury is complete, an award of interest is necessary in order to fully compensate the injured party. The court said:

* * * if a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to someone, he certainly would be entitled to interest, and, if he borrowed it from someone, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is

simply placed in statu quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish. Is it an answer to say that the damages are unliquidated, and therefore interest is not to be allowed? This, to our minds, is no reason at all in case of injury to or destruction of property. In all such cases the party sustaining the loss is limited in his recovery to the market or actual value of the property at the time of the injury or destruction. Moreover, he must establish the amount of the loss by some fixed rule or standard, and the evidence must be confined thereto, and either the court or jury must find the value in accordance with the evidence. In the class of cases, therefore, where the damage is complete, and the amount of the loss is fixed as of a particular time, there is -- there can be -- no reason why interest should be withheld merely because the damages are unliquidated.

The court distinguished cases where damages are established by some fixed rule or standard, from those in which the damages are determined by the judgment of the finder of fact, pointing out that in the latter type of cases the damages are incomplete up to the trial, and are "peculiarly within the province of the jury to assess at the time of the trial." Types of actions the court is talking about in this exception are personal injury, death by wrongful act, libel, slander, false imprisonment, malicious prosecution, assault and battery, and the like.

In concluding its opinion, the court said:

The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow when fixing the amount,

rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standard of value. The same rule under the same conditions would of necessity apply to actions for breach of contract. * * * (emphasis added).

The rules laid down in Fell have never been overruled or seriously challenged, and have been followed in numerous other cases decided by this court.

In Kimball v. Salt Lake City, 32 Utah 253, 90 P. 395, 397, (1907), interest was allowed on a claim for damages to real property arising out of the change of grade of a street.

In Jack B. Parson Construction Company v. State of Utah, 552 P.2d 107 (Utah 1976), prejudgment interest was allowed in connection with a construction contract, the contractor claiming what was essentially an equitable adjustment in price, although the parties were poles apart with respect to the amount due.

In Wunderlich Contracting Company v. United States ex rel. Reischel and Cottrell, 240 F.2d 201 (10th Cir. 1957), the Court of Appeals, applying Utah law, approved the award of prejudgment interest in a case that was based upon quantum meruit, or the reasonable value of labor and materials furnished by a subcontractor to a contractor.

In Uinta Pipeline Corp. v. White Superior Co., 546 P.2d 885, 887 (Utah 1976), a case in which prejudgment interest

was allowed for damage to a compressor station, the court cites a number of other cases in which the Fell decision has been followed by the Utah court.

We will make no attempt to distinguish the cases cited by appellant because those cases are representative of a philosophy of interest in which "liquidated" is the key word. They are not in harmony with the Utah philosophy of interest as it has been applied since Fell. This case comes within the rule established by Fell. The plaintiff's damages were computed on the basis of out-of-pocket expenditures, shown by the books and records of the company; by the value of architectural drawings, engineering plans and specifications, established by testimony of experts; and by the value of services performed by Fahs as manager of the project, also established by testimony. These were not damages like those in personal injury or defamation cases where the damages are to be fixed in the judgment of the the trier fact. The damages were complete, and interest is necessary if Ranch Homes is to be fully compensated for the injury.

Appellant also complains, but without citing any authority, that interest should not have been awarded because the plaintiff did not demand it, either in its complaint or at the trials.

But the complaint had a demand for general relief (R. 1) and it is usually held that a demand for general relief empowers the court to grant whatever relief the facts pleaded and proved require. 61 Am Jur 2d, Pleading, § 124.

Even if the complaint had contained no demand for general relief, respondent has the benefit of Rule 54(c)(1), Utah Rules of Civil Procedure, which provides:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. * * *

The demand for judgment is not part of the statement of the claim. There is no possibility that the appellant was misled by the failure to ask for interest in specific terms, because interest is allowable as a matter of law, and the factual presentation would not have varied a whit.

V

The Costs Allowed by the Trial Court were Proper.

In its brief the appellant complains of (1) the allowance to respondent of costs incurred in connection with the first trial; and (2) allowance of witness fees for attendance of Fahs, Tuckett, and Kesler, three officers of Ranch Homes.

The verdict and judgment in favor of Ranch Homes in the first trial was set aside by the trial court and a new trial granted. On the second trial judgment was entered in favor of plaintiff Ranch Homes again, and the court allowed costs to plaintiff for both the first and second trials.

Fees to be paid witnesses are found in 21-5-8 Utah Code Annotated 1953, and the section also provides that witness fees "may be taxed as costs against the losing party."

Another provision relating to costs is found in Rule 54(d)(1), Utah Rules of Civil Procedure:

Except when express provision therefor is made either in the statutes of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *

Without citing any authority, the appellant claims that it was not the "losing party" and conversely, apparently, that respondent was not the "prevailing party" in the trial court.

But the rule doesn't segment cases for purposes of costs. There is only one prevailing party -- "the one who in the end and on the entire case, no matter how diverse the issues or the nature of them, is entitled to judgment."

Checketts v. Collings, 78 Utah 93, 1 P.2d 950, 953 (1931).

In Hughes v. Chicago, St. P., M. & O. Ry. Co., 126 Wis. 525, 106 N.W. 526, 530 (1906), plaintiff had prevailed at the first trial, but a new trial was granted. He then prevailed on the second trial but the judgment was reversed on appeal. After the third trial, in which plaintiff was again the prevailing party, the court refused to allow his costs in the first two trials. On appeal, the Wisconsin Supreme Court held that costs for the first two trials should have been awarded to plaintiff, saying:

* * * Section 2918, Rev. St. 1898, regulating costs is broad and general and provides that "costs shall be allowed as of course to the plaintiff in an action in the circuit court upon a recovery. * * *" This statute clearly does not confine the costs of an action to a single trial, but covers the costs of the action and is broad enough to include costs of former trials where the costs were not paid as a condition of the new trial. Such has been held to be the rule in other states under similar statutes. * * * The lower court, therefore, erred in denying plaintiff's costs on the first and second trials. [Citations omitted]

This case was followed in Wendt v. Finch, 235 Wis. 220, 292 N.W. 890, 893 (1940).

In Mills v. Southwest Builders, Inc., 70 N.M. 407, 374 P.2d 289, 296 (1962), the first trial ended in a mistrial but the plaintiff prevailed on the second trial. The trial court, relying upon a rule of procedure substantially the same as our Rule 54(d), held that because the jury failed to return a verdict the plaintiff was not the prevailing party in the first trial and the costs of that trial should not be allowed. The New Mexico Supreme Court said:

Section 21-1-1 (54)(d), NMSA 1953, quoted above, is controlling. What is included in "costs"? They are defined as "statutory allowance to a party for his expenses incurred in an action." [Citations omitted] We find nothing in §21-1-1(54)(d), or in the other section noted by the trial court limiting "costs" to expenses of trial, or of the last trial. If on the first trial a verdict had been reached, but on appeal there was a reversal and a new trial ordered which again resulted in a verdict, the party ultimately prevailing would be entitled to his proper expenses on the first trial, as well as on the second. Such is the prevailing rule. [Citations omitted]

Other cases allowing costs for the first trial are Brunnabend v. Tibbles, 76 Mont. 288, 246 P. 536, 539 (1926), wherein plaintiff had prevailed at both trials, and Senior v. Anderson, 130 Cal. 290, 62 P. 563, 567 (1900).

The appellant also contends that witness fees should not have been paid for the attendance of Fahs, Tuckett and Kesler, the officers of Ranch Homes, relying upon Western Creamery Co. v. Malia, 89 Utah 422, 57 P.2d 743, 746 (1936). The reliance on Western Creamery is misplaced, however, because the case is against the appellant's position. There the losing party contended that fees for one of the witnesses should not have been allowed because he was an officer or employee of the corporation helping with the conduct of the trial. The court recognized that one who is in court "necessarily attending to the conduct of the suit" is not entitled to a witness fee but added, as is true in this case, that "there is nothing in this record that shows or tends to show that Monson was in court attending to the conduct of the trial." The only thing we have in this case is the appellant's naked statement to that effect in its brief.

The fact that some of the witnesses did not testify on each of the days they attended the trial does not preclude the allowance of witness fees for them. In Burtenshaw v.

the court said:

It is settled in this state that the prevailing party is entitled to tax as costs the statutory per diem for witnesses subpoenaed in good faith and actually attended the trial even though they may not have testified each day of attendance or at all.

CONCLUSION

The appellant had a fair trial, in fact two fair trials in which the jury and then the court found that Ranch Homes, Inc., had been substantially damaged by the appellant's breach of contract.

The evidence shows that the damages awarded to Ranch Homes were foreseeable in light of the negotiations of the parties and the specific terms of the contract. The evidence also justifies the finding of fact that the damages awarded were reasonable. They were not shown to be unreasonable. Both of these questions are fact questions, and both of them, on the basis of conflicting evidence, were decided against the appellant.

A holding that the only measure of damages in a contract in which there is an option to purchase real estate is the difference between the contract price and the market value at the time set for the conveyance would leave many parties without a remedy. It is an unrealistic and illogical type of remedy in a case such as this where the parties were dealing with much more than a simple sale of real estate,

and were contemplating that the real property would be developed and sold as a residential subdivision. The cases support the view that expenditures made in reliance upon the contract should be allowed and, in addition, that where loss of profits is shown such profits should be allowed if they were within the reasonable contemplation of the parties -- which they were in this case.

The defendant's arguments with respect to mitigation, interest, and costs, appear to have been added to the brief solely for the purpose of giving it weight. The cases clearly establish that there was no failure on the part of the plaintiff to mitigate damages, and there is no evidence showing what the extent of mitigation might have been. Prejudgment interest is awardable in this state if the damages are complete and they can be fixed by some ascertainable standard of value. And the costs of both trials for all of the witnesses called by the plaintiff were properly allowed.

It's time this case came to an end. The appellant has had its days in court, a multitude of them, and the judgment of the trial court should be affirmed with costs to respondent.

Respectfully submitted,

/s/ Bryce E. Roe

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CERTIFICATE OF MAILING

Two copies
~~A copy~~ of the foregoing RESPONDENT'S BRIEF was mailed,
postage prepaid, to F. S. Prince, Jr., Esq., Donald J.
Winder, Esq., PRINCE, YEATES & GELDZAHLER, 455 South Third
East, Salt Lake City, Utah 84111, attorneys for appellant,
on this 3rd day of ~~March~~ *April*, 1978.

/s/ ALICE V. CHRISTENSEN