

1997

Joseph R. and Florence Brunetti v. Gilbert R. Turner, Kenneth T. Holman and Overland Development Corp. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH R. and FLORENCE BRUNETTI

Plaintiffs/Appellees/Cross-Appellants

v.

Case No. 970330-CA

GILBERT R. TURNER, KENNETH T.
HOLMAN and OVERLAND
DEVELOPMENT CORP.,

Defendants/Appellants/Cross-Appellees.

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH
HONORABLE SANDRA N. PEULER, DISTRICT JUDGE

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Argument priority classification 15

**UTAH COURT OF APPEALS
BRIEF**

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STATEMENT OF ISSUES -- THE BRUNETTIS' CROSS-APPEAL

1. Should Judge Peuler have allowed plaintiffs to amend their pleadings on the issue of fraud to include misrepresentations in Overland/Holman's letter/offer which formed a part of the land sale contract, which misrepresentations were discovered and proven in and from the deposition testimony of Turner and the documents (financial statements and tax returns) submitted by Overland and Turner in support of their motion for summary judgment?

2. In the face of the undisputed facts adduced at trial that (a) Overland never deposited the first \$15,000 nonrefundable earnest money in trust as required by the agreement and that Turner did not require them to do so, (b) although Holman did testify at trial that he made some efforts to try and develop the Eastern Parcel, sometime in June or July of 1990, Overland and Turner agreed to work together to develop both the Eastern and Western Parcels, and started development efforts thereon rather than on just the Eastern Parcel as required by the purchase agreement, (c) when the Brunettis refused to modify the agreement with respect to the payment of the nonrefundable earnest money deposits, Overland and Turner boldly approached the Brunettis with a proposal that the agreement be modified to include the purchase and development of both the Eastern and Western Parcels (and to allow Overland to escape its obligations to pay the two required \$15,000 earnest monies), (d) when the Brunettis refused, Overland/Holman wrote a letter to the Brunettis brazenly and falsely thanking the Brunettis for modifying the agreement despite the fact that no such agreement had been reached, and (e) despite having no justification for doing so, Overland asked Turner to return the first \$15,000 earnest money check, which Turner did return, was it reversible error for Judge Peuler to find that there was no evidence of a breach of the implied covenant of good faith and fair dealing by Overland and Turner?

3. In the face of the foregoing undisputed facts, was it also reversible error for Judge Peuler to find that Turner did not breach his fiduciary duty to his purported principals, the Brunettis?

4. Are attorney's fees awardable as consequential damages in breach of the implied covenant cases?

ARGUMENT -- THE BRUNETTIS' CROSS APPEAL

I. THE PLEADINGS SHOULD HAVE BEEN AMENDED TO CONFORM TO THE EVIDENCE LITIGATED AND ADDUCED IN THE SUMMARY JUDGMENT ARGUMENTS AND AT TRIAL AS TO THE FRAUD OF THE DEFENDANTS

A. THE OVERLAND LETTER/OFFER MADE REPRESENTATIONS CONCERNING OVERLAND'S HISTORY AND FINANCIAL CONDITION WHICH WERE CLEARLY INTENDED TO BE RELIED UPON BY THE BRUNETTIS

The April 6, 1990 letter from Overland to Gil Turner (Plaintiffs' Exhibit P1 attached as Exhibit A to the Brunettis' first Brief), stated the following: "The terms of the purchase are slightly different from the normal Earnest Money Agreement that is presented, however, we have found our approach to be very sound and profitable for both the landowner and the developer. Over the past 6 years we have developed over \$30 million of real estate using this method. ..."

This language clearly implies that (1) the method of using a sham joint venture to fraudulently induce a lender to make a construction loan is "very sound and profitable," (2) that Overland prior thereto had a 6 year successful track record, (3) that Overland had developed \$30 million of real estate using the "using this [sham joint venture] method, and (4) implying that Overland has substantial resources -- else how would it have been able to develop \$30 million in real estate over the then past six years. None of these representations turned out to be true: (a) the sham joint venture method of developing real estate is not "sound," it is illegal; (b) Overland was then a brand new corporation with no track record at all, much less "\$30 million of real estate," and (c) Overland had no financial resources at all (only a few pieces of office furniture)

R. 354, 359, 360.

B. IN HOLMAN'S DEPOSITION, HE ADMITTED THAT OVERLAND WAS A NEW CORPORATION WITH NO HISTORY AND NO FINANCIAL WHEREWITHAL -- CONTRARY TO THE REPRESENTATIONS IN THE LETTER OFFER

Attached to the plaintiffs' Memorandum in Opposition to Defendants Holman and Overland's Motion for Summary Judgment and Partial Summary Judgment **R. 337-368** are excerpts from Holman's deposition testimony. In that testimony, Holman admitted that Overland was a newly organized corporation with essentially no assets in 1990:

Q. When was Overland Development Corporation incorporated?

The Witness: June 30, 1989. **R. 358 (p. 61 lines 19-24)**

Q. Was any capital contributed to Overland Corporation in 1989?

A. Yes, \$1,000 was put in the corporation.

Q. Anything else?

A. That was it initially.

Q. Was there any other capital put in Overland Corporation in 1989 besides this initial \$1,000?

A. I don't recall. **R. 359 (p. 62 lines 8-18)**

Q. ... Do you recall what capital, if any, was contributed to Overland Development Corporation in 1990?

A. No, I do not.

Q. Did Overland Development Corporation earn any income in 1990?

A. Not to my knowledge. **R. 359 (p. 64 lines 1-7)**

Q. How was Overland Development Corporation going to pay the earnest money fee to the Brunettis?

A. It would have been transferred either from me personally, or from one of the other two entities, either Realfacts or Overland Management.

Q. Because Overland Development didn't have any cash; is that right?

A. Yes, that's correct. **R. 360 (p. 66 line 22 - p. 67 line 4)**

Q. During 1990 did Overland Development Corporation have any ownership interest in real property?

A. None. **R. 354 (p. 18 lines 22-25)**

Q. In 1990, what property of any nature did Overland Development Corporation own?

A. None other than personal property.

Q. What personal property did it own?

A. Furniture, some equipment.

Q. Can you tell me what kind of equipment?

A. A couple of computers, those kinds of things. **R. 354 (p. 19 lines 10-16)**

This testimony was filed with the Court in connection with the motions for summary judgment.

C. THE DEFENDANTS SUBMITTED FINANCIAL INFORMATION AND TAX RETURNS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF ALTER EGO/PIERCE THE CORPORATE VEIL WHICH ALSO DEMONSTRATED THAT OVERLAND HAD NO ASSETS AND NO PRIOR DEVELOPMENT HISTORY

To support their contention that Overland was a legitimate corporation, and not the alter ego of Holman, the defendants submitted the Affidavit of Kenneth T. Holman, **R. 270 -317**, which had attached thereto copies of the articles and minutes of board meetings of Overland. Copies of tax returns were apparently supposed to also be attached, but were not initially. After plaintiffs inquired as to the missing tax returns, they were produced and filed with the Court, and are found in the Record at **R. 386-407**. These corporate documents and tax returns were presented as evidence to the Court on the issue of alter ego/pierce the corporate veil, but they proved that the original letter/offer from Overland contained serious misrepresentations, and that Overland and Holman failed to disclose material facts (such as Overland's total lack of cash or other resources to be able to purchase the Brunettis' property). The pleadings should have been later allowed to be amended to conform to this evidence which was produced by the defendants themselves.

D. THE BRUNETTIS TESTIFIED THAT THEY RELIED UPON THE STATEMENTS MADE IN THE LETTER/OFFER IN DECIDING TO ENTER INTO THE AGREEMENT, AND WOULD NEVER HAVE DONE SO IF THEY HAD KNOWN THE TRUTH ABOUT HOLMAN/OVERLAND -- WHICH RELIANCE WAS REASONABLE

The Brunettis testified at their depositions and at trial that they relied on the information in the letter/offer in deciding to enter into the agreement. **R. 996, pp. 37-38** The letter/offer

obviously was meant to make the Brunettis think that Overland was a substantial entity with significant development experience, and that what it proposed to do was “sound.” **R. 997, p. 228**

The Brunettis did not know this to be false. If they had known, they would never have entered into the agreement and taken their property off the market. The Brunettis’ reliance was reasonable.

E. THESE FACTS WERE NOT ONLY ALL DEVELOPED DURING DISCOVERY AND ARGUED AND PRESENTED BY THE PARTIES IN CONNECTION WITH THE CROSS MOTIONS FOR SUMMARY JUDGMENT -- MANY OF THESE FACTS WERE ALSO INTRODUCED IN CONNECTION WITH THE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The defendants argue that these facts were developed and argued only in the context of the alter ego/pierce the corporate veil portion of the motion for summary judgment. It is true that this is where the corporate documents were first produced, and that the plaintiffs did not realize that they had solid evidence from the defendants’ own documents and mouths of additional fraud until this evidence came out -- but, as argued by the plaintiffs in their Plaintiffs’ Response to Defendants’ Objection on Relevance Grounds and Motion to Amend to Conform to the Evidence **R. 544 - 551**, once evidence which would support a particular type of relief (regardless of whether it has been previously requested or not) has been adduced/ presented to the Court, the Supreme Court has ruled that the pleadings should be amended to conform to that evidence and appropriate relief granted. See Guardian State Bank v. Stangle, 778 P. 2d 1 (Utah 1989). This Judge Peuler failed to do, and justifies reversal.

The plaintiffs signaled in their opening statement that they intended to introduce evidence at trial on these additional aspects of defendants’ fraud, but the defendants interrupted plaintiffs’

opening, objected and the Court ruled that she would not allow evidence on these other aspects of fraud. The plaintiffs argued that this evidence had been previously litigated. The plaintiffs also argued that the evidence proving the fraud was also evidence proving breach of the implied covenant of good faith and fair dealing, and, when that evidence was later admitted in connection with these other issues, the pleadings should be amended to conform to it. **R. 996, p. 11-12, 70-73, 85-92, 179-81; R. 997, p. 206, 208, 231-235, 245-46, 275-76, 279, 339-43; R. 998, p. 455-58; R. 999, p. 503-04, 508-12.** The defendants thereafter objected strenuously to some of plaintiffs' evidence on the grounds of relevance. **R. 996, p. 13-14, 70, 74, 94, 179-81; R. 997, p. 206, 228-31, 246-47, 276-68, 339-40, 343; R. 998, p. 454-58; R. 999, p. 503-508.** The aforementioned "Plaintiffs' Response to Defendants' Objection on Relevance Grounds and Motion to Amend to Conform to the Evidence" **R. 544 - 551** was a response to these objections. **R. 996, p. 71-93** The Court attempted to limit plaintiffs' evidence, and denied plaintiffs' repeated requests to amend the pleadings to conform to the evidence. **R. 996, p. 75, 94-95, 179-81; R. 997, p. 247, 279, 341-43; R. 998, p. 457-58; R. 999, p. 516.**

However, evidence was admitted on all aspects of the claims that plaintiffs proposed to make: **R. 996, pp. 30-31** (the letter/offer was admitted), **36-38** (the Brunettis relied on those representations in the letter/offer), **42, 69** (Holman told Turner about Overland's experience and track record), **75, 139** (Holman and Turner talked about becoming partners), **182** (Holman testified that the statements in the letter/offer were "true"); **R. 997, pp. 228** (Holman testified that he intended the Brunettis to rely upon the representations and statements in the letter/offer, and that they were intended to induce the Brunettis to enter into the land sale contract), **245-46** (impeachment of Holman re track record), **261-271** (impeachment of Holman re lies in letter to

the Brunettis after everything fell through), 277 (Holman admitted that Overland's tax returns showed no earnings and less than \$3000 in assets), 279 (Overland's tax returns are admitted), 304 (Holman states broadly that he never committed any "fraud"), 305-307 (Holman testifies about his and Overland's track record), 308, 339-341 (Holman admits that Overland did not have the money to purchase the property, and could not do so unless it found a joint venture partner). When plaintiffs moved to amend to conform to this evidence, for example at R. 997, p. 341., Judge Peuler ignored the Utah Supreme Court holdings in Guardian State Bank v. Stangle, *supra*; Behrens v. Raleigh Hills Hosp., Inc., 675 P. 2d 1179, 1182 (Utah 1983); and Eie v. St. Benedict's Hospital, 638 P. 2d 1190 (Utah 1981), and refused.

F. THE PLEADINGS AS TO FRAUD SHOULD HAVE BEEN AMENDED TO CONFORM TO THIS EVIDENCE

Rule 54(c)(1), U.R.C.P., is explicit: "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." Rule 15(b), U.R.C.P., states:

Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time ..."

If the evidence had not yet come in, Judge Peuler would have had some discretion as to whether to allow it. But, when the evidence came in (1) first in connection with the motion for summary judgment, and (2) then, even after defendants' objections, during the trial (much of it during the defendants' own questioning of themselves) as found at the citations in the record in the previous section, Judge Peuler no longer had any discretion. Rule 15(b) states that such

issues actually tried “shall be treated in all respects as if they had been raised in the pleadings.” Judge Peuler committed reversible error when she denied plaintiffs’ motion to amend after this evidence had actually been admitted. The case should be remanded for a new trial on the fraud counts against the defendants on these other factual bases.

II. THE UNDISPUTED CONDUCT WHICH PLAINTIFFS CITE AS EXAMPLES OF THE DEFENDANTS’ BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, TOGETHER, REQUIRE A FINDING OF SUCH A BREACH

The defendants attack the plaintiffs’ claim that Judge Peuler’s ruling that the defendants did not breach the implied covenant of good faith and fair dealing on two grounds (1) that plaintiffs have not marshaled the evidence in favor and against that ruling, and (2) that even if granted, plaintiffs would not be entitled to the attorney’s fees that they seek as consequential damages. With respect to marshaling, it is important to note that the plaintiffs contended that there were a number of facts without dispute, and that those facts alone required a finding, as a matter of law, that a breach of the implied covenant had occurred. The defendants did not deny that these facts were without dispute. Consequently, this Appeals Court can assume that they are true and decide whether, as a legal matter, they require a finding of a violation of the implied covenant. Plaintiffs believe that they do, and respectfully request such a ruling.

However, with respect to marshaling, the implied covenant of good faith and fair dealing is such a broad concept that every item of testimony adduced at trial arguable related to it. This Court can assume that every fact obtained at trial related to the issue and supported the Court’s ruling -- the entire transcript. But, it is plaintiffs’ position that the following cited items of misconduct are sufficient to find a violation, to-wit, that:

(a) Overland never deposited the first \$15,000 nonrefundable earnest money in trust as required by the agreement and that Turner did not require them to do so,

(b) although Holman did testify at trial that he made some efforts to try and develop the Eastern Parcel, sometime in June or July of 1990, Overland and Turner agreed to work together to develop both the Eastern and Western Parcels, and started development efforts thereon rather than on just the Eastern Parcel as required by the purchase agreement,

(c) when the Brunettis refused to modify the agreement with respect to the payment of the nonrefundable earnest money deposits, Overland and Turner boldly approached the Brunettis with a proposal that the agreement be modified to include the purchase and development of both the Eastern and Western Parcels (and to allow Overland to escape its obligations to pay the two required \$15,000 earnest monies),

(d) when the Brunettis refused, Overland/Holman wrote a letter to the Brunettis brazenly and falsely thanking the Brunettis for modifying the agreement despite the fact that no such agreement had been reached, and

(e) despite having no justification for doing so, Overland asked Turner to return the first \$15,000 earnest money check, which Turner did return.

III. ATTORNEY'S FEES SHOULD BE AWARDED AS CONSEQUENTIAL DAMAGES AS A RESULT OF THE DEFENDANTS' CONDUCT HEREIN

The Utah Supreme Court has ruled in broad language that attorney's fees are elements of consequential damages that should be awarded when a breach of the implied covenant of good faith and fair dealing is found. See Heslop v. Bank of Utah, 839 P. 2d 828 (Utah 1992); Canyon Country Store v. Bracey, 781 P. 2d 414, 419-20 (Utah 1989); Zions First Nat'l Bank v. National Am. Title Ins., 749 p. 2d 651, 656-57 (Utah 1988); Beck v. Farmers Ins. Exch., 701 P. 2d 795, 801-02 (Utah 1985). The Utah Court of Appeals, however, in Collier v. Heinz, 827 P. 2d 982 (Utah App. 1992), ruled that attorney's fees should only be awarded as consequential damages for breaches of the implied covenant in employment cases, since at the time that Collier was handed down, the Supreme Court cases affirming such awards involved only bad faith insurance

cases. This ruling cannot be correct, since in Heslop v. Bank of Utah, *supra*, the Utah Supreme Court stated that attorney's fees could be awarded in a case involving an employment contract. If the Utah Supreme Court had wanted to limit its ruling to only insurance and employment contract cases, it would have done so.

Further, the Utah Supreme Court cases do not allow an award in "all contract cases," as the Collier Court worried. The award is only appropriate if the court/jury has found a violation of the implied covenant of good faith and fair dealing -- which does not occur in every breach of contract case. Simply speaking, the Collier case is wrong and should be reversed -- especially in light of the Heslop decision.

IV. THE UNDISPUTED CONDUCT WHICH PLAINTIFFS CITE AS EXAMPLES OF TURNER'S BREACH OF FIDUCIARY DUTY, TOGETHER, REQUIRE A FINDING OF SUCH A BREACH

For the same reasons set forth in section III above, this Court should find that said conduct requires a finding, as a matter of law, that Turner breached his fiduciary duty to his clients, the Brunettis. Judge Peuler's ruling to the contrary should be reversed.

V. TURNER HAS NOT APPEARED HEREIN AND OPPOSED PLAINTIFFS' CROSS -APPEAL

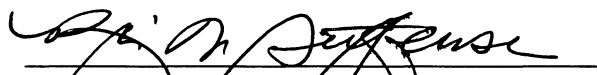
Turner's counsel withdrew early in this appeal. Turner was served with a notice to appear or appoint new counsel. Turner has not done so, and has not opposed the plaintiffs' cross-appeal as it relates to him.

CONCLUSION

For the reasons set forth above, the plaintiffs/appellees and cross-appellants respectfully request that: (1) Overland's appeal be denied, and that the orders granting and then affirming

after trial the summary judgment be affirmed; (2) that Judge Peuler's refusal to allow plaintiffs' pleadings to be amended to conform to the additional aspects of fraud by the defendants be reversed and the case remanded for trial on these additional issues; (3) that this Court find that, as a matter of law, Overland and Turner breached the implied covenant of good faith and fair dealing based upon the factual matters that are not disputed and which were set forth in detail above; (4) that this Court reverse Collier v. Heinz, supra, and find that given the Heslop case, and other factors, there should be no limitation on the granting of attorney's fees in breach of implied covenant cases; (5) that this Court find that as a matter of law, Turner breached his fiduciary duty to the plaintiffs, and that the case be remanded for a determination of damages, actual and exemplary.

Respectfully submitted this 11th day of February, 1998.



Brian W. Steffensen
Attorney for Plaintiffs/Appellees/Cross-
Appellants Brunettis

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 1998, I caused a true and correct copy of the foregoing instrument to be xxx mailed, postage prepaid; and/or hand-delivered by fax and/or by courier; addressed to:

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