

1997

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

Utah Court of Appeals

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JOSEPH R. and FLORENCE
BRUNETTI,

Plaintiffs/Appellees,

y.

Case No. 970339-CA

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

Defendants/Appellant.

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEES

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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COURT OF APPEALS

JOSEPH R. and FLORENCE
BRUNETTI,

v.

Defendants/Appellant.

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REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEES

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RESTATEMENT OF ISSUES ON CROSS-APPEAL

1. Did the trial court act properly and within its discretion in refusing to permit Plaintiffs to amend their Complaint at trial to assert additional acts of allegedly fraudulent conduct or refusing to admit evidence of additional acts of allegedly fraudulent conduct?
2. Is there sufficient evidence to support the trial court's findings of fact showing that Overland Development Corp. ("Overland") did not breach the implied covenant of good faith and fair dealing?
3. Have Plaintiffs failed to marshal the evidence as is necessary to attack the trial court's findings of fact on appeal?

STATEMENT OF FACTS

1. In their Complaint, Plaintiffs set forth specific acts of allegedly fraudulent conduct by Overland, Kenneth Holman ("Holman") and Gilbert Turner ("Turner"). **R. 5-7.**
2. These acts centered around a then-unfunded earnest money check in the amount of \$15,000 given by Overland to Turner, Plaintiffs' agent, and the failure of Turner to hold these funds in trust. No other acts of fraudulent conduct were set forth in the Complaint. **Id.**
3. In February 1995, Holman and Overland moved for summary judgment on Plaintiffs' claim for fraud, specifically addressing the events surrounding the \$15,000 earnest money check. **R. 188-91.**
4. In April 1995, Plaintiffs filed their Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Memorandum In Opposition"). **R. 337-47.** In this document, Plaintiffs now claim that they raised what they believed to be questions of fact

regarding the allegedly fraudulent conduct. **R. 338-40, paragraphs 3-12.** Most of these paragraphs address the issue of the unfunded \$15,000 earnest money check alleged as the fraudulent conduct in the Complaint. In fact, the argument section of Plaintiffs' Memorandum in Opposition makes it clear that at this time they were only alleging fraud as it related to the unfunded earnest money check. **R. 342-44.** As can be determined from Plaintiffs' Memorandum in Opposition, the remainder of these paragraphs address Plaintiffs' request that the trial court pierce the corporate veil to hold Holman personally liable for the claims against Overland. **R. 340-46.**

5. Overland and Holman moved to strike paragraphs 1, 2, 3, 4, 5, 6, 9, 10 and 11 of the Memorandum in Opposition on the grounds that they were legal conclusions without foundation. **R. 321-22; see also R. 256-66.**

6. At the hearing on Holman's and Overland's Motion for Summary Judgment, Richard Rappaport and the trial court addressed the fraud issue in terms of the unfunded \$15,000 earnest money check. **R. 849-55 and 871-74.** In response, Mr. Steffensen also addressed the issue of fraud in terms of the \$15,000 unfunded earnest money check. **R. 857-61 and 878.** In fact Mr. Steffensen stated:

Mr. Rappaport held up the May 7th letter and said, here is the fraud they're complaining about. No. The fraud we complain about is the April 6th letter, which promised that the money would be deposited, which the Brunettis signed and which they knew about. That's where the fraud is.

R. 878. The rest of Mr. Steffensen's argument addresses Plaintiffs' alter ego theory and piercing the corporate veil. **R. 861-71.**

7. The trial court found that there existed questions of fact with regard to Plaintiffs' claim of fraud and denied Holman's and Overland's Motion for Summary Judgment as to this claim, stating:

[T]here's an issue of fact that has been raised in the pleadings that I've reviewed, regarding whether or not defendant corporation intended to follow through with its promise to pay the \$15,000 earnest money. . . .

R. 932-33.

8. At trial, Plaintiffs sought to amend their Complaint and to argue and introduce additional evidence of alleged fraudulent conduct by Overland, Holman and Turner. **R. 996, p. 11-12, 70-73, 85-92, 179-81; R. 997, p. 206, 208, 231-35, 245-46, 275-76, 279, 339-43; R. 998, p. 455-58; R. 999, p. 503-04, 508-12.**

9. Overland, Holman and Turner objected to Plaintiffs' argument and the introduction of this evidence on the grounds that it was prejudicial to them because they were not prepared to introduce contradictory evidence on the other instances of alleged fraud due to lack of notice. **R. 996, p.13-14, 70, 74, 94, 179-81; R. 997, p. 206, 228-31, 246-47, 276-78, 339-40, 343; R. 998, p. 454-58; R.999, p. 503-08.**

10. The trial court sustained Holman's and Overland's objection due to Plaintiffs' failure to plead the alleged acts of fraud with particularity in the Complaint and that Defendants were entitled to rely on the Complaint in preparing and trying the case. **R. 996, p. 75, 94-95, 179-81; R. 997, p. 247, 279, 341-43; 998, p. 457-58; R. 999, p. 516.**

11. At trial and on appeal it is evident that the only relief Plaintiffs seek through their claims against Overland and Holman for fraud and breach of the implied covenant of

good faith and fair dealing is the recovery of their attorney's fees and costs as consequential damages, although the Brunettis make some veiled claim to "exemplary damages" as a result of the alleged fraud. **R. 997, p. 335-37; R. 998, p. 478-84; R. 999, p. 529-31; Plaintiffs' Brief, pages 10, 23, 26, 40 & 41.**

12. The trial court determined that the remedy of attorney's fees and costs was not available in this instance for breach of the covenant of good faith and fair dealing. **R. 999, p. 569-70.** The trial court also found that Plaintiffs had not proved a claim for fraud based upon the unfunded initial \$15,000 earnest money check. **R. 999, p. 565-69.**

SUMMARY OF ARGUMENT

The trial court erred in granting Plaintiffs' Motion for Partial Summary Judgment due to numerous questions of material fact which should have been construed in Overland's favor. Throughout their Brief, Plaintiffs point to facts found by the trial court and state that these facts are the most believable. Who has the most believable facts, when there are disputed issues of material fact, is not the issue when addressing summary judgment. It is sufficient that there are disputed issues of material fact to defeat a motion for summary judgment. Here there exists real and substantial differences between the parties as to the facts of this case. First, there are significant questions of fact regarding the earnest money. Plaintiffs state that it was non-refundable and forfeited when the deal to develop the Property failed. Overland maintains and the Agreement states that the earnest money is only payable upon a closing of a construction loan or if Overland requests an extension of time to develop the Property, which it did not.

There are issues of material facts as to whether the parties ever had a meeting of minds on the joint venture agreement. The Agreement specifically states that the parties will enter into a joint venture agreement to develop the Property and anticipates that the terms of the joint venture agreement will be determined by subsequent negotiations. Overland maintains that it would not have done the deal without a joint venture agreement. Plaintiffs maintain that they had no intention of entering into such an agreement. Instead, in order to support their claim that summary judgment was appropriate, Plaintiffs have taken the position that the joint venture was a sham. Either the Agreement is ambiguous, in which case the trial court should have considered parol evidence which was in dispute, or it is clear, in which case the Agreement requires a joint venture. Thus, Plaintiffs breached the contract prior to any breach by Overland, excusing performance by Overland.

Overland has maintained throughout this litigation that the Agreement was not fully integrated as there was not a meeting of the minds on either the joint venture or the earnest money provisions of the Agreement. Where an agreement is neither fully integrated nor unambiguous, parol evidence which was in dispute, must be admitted. Since the parties dispute whether there was a meeting of the minds on critical terms of the Agreement such as the earnest money provisions and the joint venture provision, there was not an integrated contract, and this matter must be remanded for a short trial.

In addition to there not being an integrated agreement, the terms are ambiguous requiring the admission of parol evidence to clarify those terms. The parties' positions in this appeal show that the Agreement is subject to two or more plausible meanings. Plaintiffs'

purported meaning is that once the Agreement was signed, the first \$15,000 was non-refundable and the Property of Plaintiffs; the second \$15,000 had to be unconditionally paid if the construction loan did not close prior to the expiration of the 120-day period; and, that the joint venture was a sham. Overland's position is that until there was an extension of the Agreement past the 120-day period, the first \$15,000 was not refundable, the second \$15,000 was only payable if Overland requested additional time to close the deal (which it did not), and the joint venture, with terms to be defined later, was required under the Agreement. Since the Agreement is ambiguous and questions of material fact exist as to the meaning of those terms, it was error for the trial court to grant Plaintiffs' Motion for Partial Summary Judgment.

With regard to Plaintiffs' appeal, Plaintiffs are not entitled any relief from this Court. First, Plaintiffs attack the facts found by the trial court after trial of this matter. In order to attack a trial court's findings of fact, a party must marshal all the evidence that supports those findings. Here Plaintiffs have not marshaled the evidence supporting the trial court's findings, and thus the trial court's findings should stand.

The relief Plaintiffs are seeking under their claims for breach of the covenant of good faith and fraud is the recovery of attorney's fees and costs. This remedy is not available under those claims. Attorney's fees and costs are not recoverable absent very specific circumstances, which are not present in this litigation, for claims for breach of the covenant of good faith or fraud. In addition, in any event, the trial court ruled that Plaintiffs had not proved a claim for fraud against Overland or Holman. Therefore, whether or not the trial court erred is irrelevant to the outcome of the litigation and is harmless error, if error at all.

At trial, Plaintiffs first sought to amend their Complaint and introduce additional evidence of alleged fraudulent conduct by Overland and/or Holman. Overland and Holman objected to Plaintiffs' Motion to Amend and to the introduction of evidence of additional allegedly fraudulent conduct. Judge Peuler sustained these objections. Since the evidence was not admitted, this is not a case to amend the pleadings to conform to the evidence under U.R.C.P. Rule 15(b). Plaintiffs did not raise the alleged acts of fraudulent conduct in conjunction with the parties' motions for summary judgment. In fact, the acts that Plaintiffs now allege are fraudulent were raised in connection with Plaintiffs' attempt to claim that Holman was the alter ego of Overland. Plaintiffs waited until trial to seek to amend their pleadings after all discovery, pretrial motions and trial preparation had taken place. Plaintiffs' delay in seeking to amend the pleadings, combined with the prejudice to Defendants in not being prepared to address those issues due to lack of notice, supports the trial court's decision not to allow amendment.

ARGUMENT

I. Standard of Review

A. Overland's Appeal

In spite of Plaintiffs' contention to the contrary, Overland appeals Judge Peuler's granting of Plaintiffs' Motion for Partial Summary Judgment, not the issues of fraud and breach of the covenant of good faith and fair dealing tried to the trial court. Plaintiffs attempt to bring into play the more differential, clearly erroneous standard of review by claiming that Overland's post-trial Motion to Reconsider the Order Granting Partial Summary Judgment

resulted in the trial court's hearing evidence on the issues previously decided in favor of Plaintiffs on summary judgment. **Plaintiffs' Brief, page 5.**¹ This is not the case. In its Motion to Reconsider, as in its opening Brief, Overland pointed to one short exchange at trial regarding the Brunettis' understanding as to the joint venture agreement. This citation just bolstered deposition testimony regarding the same issue which was before the trial court on Plaintiffs' Motion for Partial Summary Judgment. Nonetheless, in that the trial court reaffirmed her prior grant of summary judgment, it is evident that she did not rely on any factual development from the trial of this matter.

As stated in Overland's opening Brief, because entitlement to summary judgment is a question of law, this Court accords no deference to the trial court's resolution of the legal issues presented. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). With regard to the trial court's interpretation of the contract, this Court reviews the trial court's decision under a correctness standard giving the trial court's interpretation no particular weight. Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

Throughout Plaintiffs' Brief, in addressing the trial court's granting of summary judgment, Plaintiffs point to the facts found or inferred by Judge Peuler and state that these facts are the most believable. Who has the most believable facts, when there are disputed

¹ Plaintiffs claim that Overland was less than candid with this Court because they allege that Overland failed to disclose to the Court that it filed the post-trial Motion for Reconsideration. However, disclosure of this fact is found under the Statement of Jurisdiction section on page 1 of Overland's opening Brief and in footnote 1, page 6 of the Brief. Throughout their Brief, Plaintiffs make similar allegations regarding Overland's alleged lack of candor with this tribunal. Plaintiffs' repetition of false allegations do not make the false allegations true. Suffice it to say, these allegations are unfounded. Every document upon which Plaintiffs base these allegations is contained in the appendix to Overland's Brief. The fact that Overland did not quote these documents in their entirety does not reveal a lack of candor to this Court.

issues of material fact, is not the issue when addressing summary judgment. In their Brief, Plaintiffs themselves list several factual issues wrongfully decided in their favor by the trial court. For example:

1. That the Agreement "refers to a construction loan, but only in the context of clarifying that the proposed 'joint venture' was not to be a real joint venture, but a sham, or non-joint venture, and to assure the Brunettis that they will be paid in full for their property at closing." **Plaintiffs' Brief, page 29. See also pages 12, 13, 16, 17, 19, 23, 30 & 31.**
2. That in spite of the language of the Agreement requiring a joint venture in developing the Property and that payment of earnest money would not take place unless a construction loan closed or an extension of time was needed, "[d]oes Overland seriously expect this Court [and the trial court] to believe that the Brunettis agreed to give Overland an interest in their property upfront, but that Overland would not have to pay the Brunettis anything for that interest unless Overland was successful in obtaining a construction loan?" **Plaintiffs' Brief, page 29.**
3. "After the trial, Judge Peuler was well within her rights as the trier of fact to compare Overland's protestations that there were contingencies with the language of not only the agreement, but also the August 25, 1990 Overland letter to the Brunettis, as well as the Brunettis' testimony as to what they understood the agreements to provide, and to resolve any factual issues in favor of the Brunettis and her prior construction of the agreement." **Plaintiffs' Brief, page 30.²**
4. That there was "an unequivocal admission [by Overland] that the Brunettis had fulfilled their obligations with respect to the 'joint venture' as of August 25, 1990, and that the Brunettis were not required to do anything further in that regard until after Overland rezoned the Property", resulting in a waiver of the joint venture requirement. **Plaintiffs' Brief, page 32.**
5. That the joint venture requirement was a sham, illegal and criminal and that "Overland is legally estopped from asserting the Brunettis' purported

² In fact, the issue of breach of contract was not tried to the court but, in ruling on Plaintiffs' Motion for Partial Summary Judgment, Judge Peuler did wrongfully find facts and indulge inferences in favor of Plaintiffs.

failure to go through with this illegal scheme as a defense to the Brunettis' contract claim. **Plaintiffs' Brief, pages 33 & 34.**

6. That in spite of the fact that Overland did not request additional time beyond the initial 120-day period and in fact had stated that the deal was off, Overland was obligated to pay the two earnest money payments to Plaintiffs. **Plaintiffs' Brief, pages 21, 22, 35-37.**

While Overland disputes that it is the case, the fact that Plaintiffs' rendition of the facts may be more believable than Overland's rendition does not mean that there is absence of disputed issues of material fact. Where reasonable minds could differ, a genuine issue of fact exists. Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982). A fact is material if, once proved, it “would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.” Wilder v. Tanouye, 753 P.2d 816, 821 (Haw. App. 1988); see also, Jensen v. IHC Hospitals, 324 Utah Adv. Rep. 20, 22 (Utah 1997).

Real and substantial differences exist between the parties as to the facts of this case. First, there are significant questions of fact regarding the first \$15,000 earnest money. Plaintiffs maintain that the first \$15,000 was non-refundable and forfeited when the deal to develop the Property failed. The Agreement states that the first \$15,000 is only payable upon closing of a construction loan, or if Overland requested an extension of time past the initial 120-day period to develop the Property. Only under these circumstances did Overland believe it was obligated to release the first \$15,000. Clearly, the construction loan regarding the Property did not close and it is Overland's contention, supported by its August 25 and September 6, 1990 letters, that it never requested an extension of time to develop the Property.

Thus, there are genuine issues of material fact with regard to the first \$15,000, which should have precluded entry of summary judgment for Plaintiffs.

Second, there are genuine issues of material fact as to whether the parties ever had a meeting of the minds on the joint venture agreement. The Agreement specifically states the parties will enter into a joint venture agreement to develop the Property and anticipates that the terms of the joint venture agreement will be determined by subsequent negotiations. Plaintiffs have repeatedly stated that from the outset, they had no intention of entering into such an agreement and now maintain that such an agreement was a sham or illegal. Overland has consistently maintained that without the joint venture agreement, it would not have entered into the Agreement.

With regard to the second \$15,000, genuine questions of fact also exist as to Plaintiffs' theory. The Agreement states that the second \$15,000 is non-refundable only if Overland requests additional time past the initial 120-day period. Plaintiffs maintain that Overland either did request additional time or was silent as to this issue. Overland maintains that it did not request additional time and in fact stated that the deal was off. This issue is not which position is correct but that there exists a genuine dispute as to these facts sufficient to defeat Plaintiffs' Motion.

B. The Brunettis' Appeal

With regard to the majority of Plaintiffs' issues on appeal, the standard of review is the more differential, clearly erroneous standard due to the fact that Plaintiffs challenge Judge Peuler's factual findings. Parker, Gould, Ames & Weaver, Inc. v. Morse, 887 P.2d 872, 875

(Utah App. 1994). In order to attack a trial court's findings of fact, a party must marshal all of the evidence supporting the trial court's findings, not the just the evidence supporting the party's position. Cornish Town v. Koller, 758 P.2d 919, 922 (Utah 1988). After review of the marshaled evidence, this Court may reverse the trial court's findings only if the trial court's "ruling contradicts the great weight of evidence or if a court reviewing the evidence is left with a definite and firm conviction that a mistake has been made." Sevy v. Security Title Co., 902 P.2d 629, 635 (Utah 1995) (citation omitted).

With regard to Plaintiffs' appeal of Judge Peuler's denial of their Motion to Amend made during and after the trial of this matter to include alleged fraudulent conduct which was not set forth in the pleadings, the standard of review is abuse of discretion. Debry v. Valley Mortgage Co., 835 P.2d 1000, 1008 (Utah App. 1992).³ The trial court's ruling is not be disturbed absent a showing by the Brunettis of an "abuse of discretion resulting in prejudice to the Brunettis." Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983).

II. Reply in Support of Overland's Appeal

Overland's appeal addresses the fact that the trial court erred in determining that the Agreement provided for the payment of earnest money to Plaintiffs either based upon the trial court's error in interpreting the Agreement or upon her failure to acknowledge that significant issues of material fact existed which preclude summary judgment. This Court reviews the trial

³ Plaintiffs cite the Court to Kimball, 699 P.2d 714, for their proposition that the standard of review on the denial of their Motion to Amend is a correctness standard. Kimball does not address any issue regarding a motion to amend. Instead, it involves the trial court's interpretation of a contract, which is admittedly reviewed by this Court under a correctness standard.

court's interpretation of the Agreement under a correctness standard affording the trial court's interpretation no particular difference. Kimball, 699 P.2d 714.

A. The trial court erred in its interpretation of the Agreement.

1. Under the Agreement, Overland was not required to pay any earnest money to Plaintiffs.

As stated by Plaintiffs, parol evidence may not be used to vary or contradict clear and unambiguous terms of a fully-integrated contract. Hall v. Process Instruments and Control, Inc., 890 P.2d 1024, 1026-27 (Utah 1995). If this Court should conclude that the Agreement is clear and unambiguous and fully integrated, Overland believes that Judge Peuler erred in her construction of that Agreement.

After negotiations between the parties, an Agreement was reached which stated in pertinent part:

A \$15,000 earnest money check would be deposited in an independent trust account to be credited to the purchase price at the time of closing with the balance being paid from the proceeds of the construction loan.

* * *

The initial contract term shall be for 120 days. Should additional time be required, the developer agrees to release the original \$15,000 earnest money to seller and replace it with another \$15,000 non-refundable earnest money for an additional 60 days.

Overland delivered a \$15,000 check and a letter to Plaintiffs' agent. That letter stated that the check could not be deposited until written instructions were received from Overland.

Prior to the expiration of the original 120-day period, Overland determined that Salt Lake City would not permit the development as proposed. On August 25, 1990, Overland

wrote to the Brunettis and informed them that until the city rezoned the Property, it would not authorize the depositing of the initial \$15,000. On September 6, 1990, Overland wrote the Brunettis stating that it was preparing a new agreement to "supersede" the original Agreement and would include both parcels of the Brunettis property. September 6, 1990 was the date on which Overland had to request an extension and deposit the additional \$15,000 sum if it wanted the Agreement to remain binding. The Brunettis responded on the same day stating that they were not interested in selling the Property under the new terms. Therefore, since Overland never requested an extension and a construction loan on the Property did not close, the initial \$15,000 never became payable to Plaintiffs.

With regard to the additional \$15,000, this amount was due only if Overland attempt to extend the deal beyond the initial 120-day contract period. **R. 174.** Since the parties believed the deal was dead no later than September 6, 1996, under no circumstance did Plaintiffs ever become entitled to the second \$15,000 earnest money.

2. The trial court erred in determining that Plaintiffs had not repudiated the Agreement by not entering into the joint venture agreement.

Under the language of the Agreement, Plaintiffs and Overland were required to enter into a joint venture agreement. Plaintiffs want this Court to find that the language of the Agreement is unambiguous and therefore affirm Judge Peuler's decision not to allow parol evidence from Overland, but insist on asserting their own parol evidence that the joint venture agreement was some sort of "sham". Plaintiffs cannot have it both ways--either the agreement is clear and requires a joint venture agreement, or it is ambiguous and parol evidence should

be considered, resulting in questions of material fact. Regardless, it is undisputed that Plaintiffs never intended to and did not enter into a joint venture agreement with Overland.

R. 648-49 and 994-95. If the Plaintiffs and the trial court are correct that the Agreement is unambiguous, Plaintiffs breached the Agreement prior to any breach by Overland. Thus, there was either a failure of a condition precedent to the Agreement,⁴ or Plaintiffs breached the Agreement prior to any alleged breach by Overland and are not entitled to any damages.

Plaintiffs claim that Overland waived the joint venture requirement in its August 25, 1990 letter. Under the Agreement, a joint venture was required of Plaintiffs and the fact that they never intended to act is a repudiation of the Agreement making it impossible for Overland to waive such requirement. Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992) (repudiation of a contract allows the other party to sue for breach of contract).⁵ In addition, the August 25, 1990, letter was proposing a new deal in which there would not be a joint venture.

Because Plaintiffs repudiated the contract by not entering into the joint venture agreement, they were not entitled to partial summary judgment against Overland. If anything, Overland was entitled to summary judgment dismissing Plaintiffs' claims due to their prior breach of contract or the failure of a condition precedent.

⁴ A condition precedent is a provision within the contract which if not fulfilled excuses performance. Creer v. Thurman, 581 P.2d 149, 151 (Utah 1978).

⁵ Waiver is very fact specific and is usually not a proper issue for resolution by summary judgment. American Falls Canal Sec. Co. v. American S. & L. Assn., 775 P.2d 412, 415 (Utah 1989).

B. The trial court should have considered the parol evidence which was in dispute, making the granting of summary judgment error.

1. Questions of fact exist as to whether there was a meeting of the minds with regard to critical terms of the Agreement.

If the Court finds that the Agreement is either unintegrated or unclear and ambiguous, then it must also consider the parol evidence propounded by the parties in order to determine the parties' intent. Hall, 890 P.2d 1027-28. It is here where Judge Peuler and Plaintiffs err in finding facts. The Agreement was neither fully integrated nor was it clear and unambiguous. Judge Peuler ruled on Plaintiffs' breach of contract claim on summary judgment, finding that there were no genuine issues of material fact. It is improper for a trial court to weigh the evidence in ruling on a motion for summary judgment.

Overland has maintained throughout this litigation that the Agreement was not fully integrated as there was not a meeting of the minds by the parties on either the joint venture or the earnest money provisions of the Agreement. To determine whether an agreement is fully integrated, any relevant evidence is admissible. Id. at 1026. Thus parol evidence is always admissible to determine whether the parties ever reached a binding contract through a meeting of the minds. Commercial Union Associates v. Clayton, 863 P.2d 29, 37 (Utah App. 1993).

Here, as stated above, it is clear that questions of fact predominate as to whether the parties ever had a meeting of the minds on three critical terms: the joint venture in the development of the Property, when the first \$15,000 earnest money became non-refundable; and when, if ever, the second \$15,000 became payable and non-refundable. In fact, with respect to the joint venture agreement, the Agreement contemplates that there will be addition

negotiations and a subsequent agreement. In short, the Agreement was simply an agreement to agree on the price to be paid to the Brunettis and that the parties would enter into a joint venture agreement with terms to be determined at a latter date. Without a mutual understanding as to these terms there could be no contract. The trial court erred in either not considering Overland's evidence on this issue or in finding that there was an absence of questions of fact.

- 2. Because the terms of the Agreement are so vague and ambiguous, this Court should vacate Plaintiffs' Summary Judgment and remand to the trial court to hear evidence regarding the parties' understanding on those terms.**

In addition to there not being an integrated Agreement, the terms of the Agreement are ambiguous requiring the admission of parol evidence to clarify those terms. Hall, 890 P.2d 1027. A contract is ambiguous if the words used to express the intention of the parties are insufficient so as the contract can be understood to encompass two or more plausible meanings. C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988). The problem with this case is that the parol evidence is in conflict. Rather than recognizing this conflict and holding a trial on the issue of the breach of the Agreement, the trial court either found facts for the Plaintiffs or found that the Agreement was clear and unambiguous.

The parties' positions in this appeal show that the Agreement is ambiguous. Plaintiffs purported meaning is: (1) once the Agreement was signed the first \$15,000 was non-refundable and the property of Plaintiffs; (2) the second \$15,000 had to be paid unconditionally if the construction loan did not close prior to the expiration of the 120-day period; and (3) the joint venture was a sham. Overland's position is that: (1) until there was

a closing or an extension of the Agreement past the 120-day period, the first \$15,000 was not non-refundable; (2) the second \$15,000 was only payable if Overland requested additional time to close the deal, which it did not; and (3) a joint venture, with terms to be defined latter, was required under the Agreement.

Plaintiffs claim that Overland's position with regard to the first \$15,000 is not plausible. However, if the first \$15,000 was immediately non-refundable and not subject to any conditions, why was it not paid to Plaintiff upon the execution of the Agreement? It was not paid to Plaintiffs upfront because it was only to be paid if the construction loan closed or Overland requested an extension. The Agreement clearly states that the second \$15,000 will be due and payable only if additional time is required. On August 25, 1990, well within the 120-day period, Overland wrote the Brunettis proposing a new deal and specifically stating that it was not requesting an extension that would require the payment of the second \$15,000 due to problems Overland was experiencing in developing the Property. On September 6, 1990, the Brunettis sent a letter to Overland stating that they did not agree to the requested extension. September 6, 1990 was the date on which the original 120-day period expired. On that date, Overland sent a second letter to the Brunettis requesting a new arrangement and stating that the original offer was terminated. After this date Overland took no additional steps to develop the Property.

Plaintiffs claim that Overland either requested additional time or was silent, thus inferring a need for additional time. **R. 120-23, 327-28 and 655-56.** On the other hand, it was Holman's testimony, supported by his August 25, 1990 and September 6, 1990 letters, that

Overland did not request an extension past that period. Clearly the parties' testimony is at odds, and where there is a disputed material fact, summary judgment is not appropriate. Therefore, at a minimum, Plaintiffs are not entitled to partial summary judgment on the second \$15,000.

In disputing the existence of the joint venture agreement, Plaintiffs argue that it "strain[s] logic to the breaking point for the Court to believe that Plaintiffs would contribute the Property upfront, but that Overland would not pay anything unless the construction loan closed." **Plaintiffs' Brief, page 29.** However, this is exactly what the Agreement requires and what Plaintiffs said they would not do once they had entered into the contract. The terms of this joint venture were to be determined through subsequent negotiation but included that Plaintiffs would contribute the Property in exchange for payment if the construction loan closed and the venture was thus successful. Overland was taking the risk of paying for all development and approval costs, to develop the Property. Overland spent considerable time and resources on these activities and did not realize any gain once the deal was off. Plaintiffs' Property was only at risk in the sense that it was off the market during the period of time between the date of the Agreement and the closing or non-closing of the construction loan. If the joint venture was successful and the construction loan closed, Plaintiffs would receive the agreed-upon price, a price which very well may have been inflated in order to take into account the time the Property was off the market and the risk of non-closing. If, as it happened, the construction loan did not close, then the Property remained in Plaintiffs' possession not subject to any claim by Overland.

Plaintiffs spend a large portion of their Brief arguing that this Court should find that the joint venture agreement was illusory or even fraudulent and as such should not be seen as a condition to the Agreement. Plaintiffs are forced to make this argument to avoid this Court overturning the granting of their Motion for Partial Summary Judgment. This is because there are, at a minimum, clearly questions of fact as to whether Plaintiffs ever intended to enter into the joint venture with Overland and, if so, what the terms of that joint venture would be. Further, such an argument clearly requires the trial court to find facts or draw inferences in Plaintiffs' favor, violating the standards for summary judgment. Fraud and criminal sanctions require intent, and intent is a classic question of fact to be resolved only after viewing all the evidence. Hardy v. Prudential Ins. Co., 763 P.2d 761, 769 (Utah 1988). The fact that upon the closing of the construction loan, the Plaintiffs were to be paid for their Property does not make the joint venture agreement a sham. It was anticipated that the Plaintiffs would contribute the Property and Overland would take the necessary steps to assure that the Property could be developed.

Also, Plaintiffs' reliance on some alleged violation of the criminal code is misplaced. Plaintiffs speculate at what might have happened at the closing of the construction loan. However, this closing never took place. Had a closing taken place, any lender worth its salt would have required a deed conveying the Property to the joint venture, and the parties would have disclosed that the Property was being paid for from the proceeds of the construction loan. This is a common practice--that is, construction loans often cover acquisition costs. Also, any payments made under a construction loan must be approved by the lender and in fact the

payment is usually made directly by the lender upon a request from the builder or developer. In short, there is no credible evidence that Overland intended to engage in any illegal activity with regard to the development of the Property.

The Agreement is ambiguous which ambiguity requires the admission of extrinsic evidence to determine the meaning of the Agreement. Based upon the parties' beliefs, as established through affidavits and deposition testimony, the extrinsic evidence is in conflict and a question of fact exists for determination by the finder of fact after a trial.

III. Opposition to the Brunettis' Cross-Appeal

A. The Brunettis have not marshaled the evidence to show that the trial court was clearly erroneous in finding against them on their claims.

As near as Defendants can discern, the majority of issues raised by Plaintiffs on appeal concern their disagreement with the facts found by Judge Peuler after the trial of this matter. It is specifically within the trial court's province to find facts. Therefore, this Court is very deferential to the trial court's findings. Morse, 887 P.2d 877 (citation omitted). In order to overturn the facts found by the trial court, this Court must find that the "evidence is legally insufficient to support the finding even viewing it in the light most favorable below." Id. Also, Plaintiffs are required to marshal the evidence when they are attempting to claim that the trial court was clearly erroneous in finding the facts. Id. This means more than simply stating the facts which support their claims. They must provide all facts supporting the trial court's findings. Id. If, as here, the party attacking the trial court's findings fails to marshal the evidence, "the trial court's findings will not be disturbed." Id. Since Plaintiffs have not marshaled the evidence supporting Judge Peuler's findings, the findings should stand.

B. Attorney's fees are not available as consequential damages under a claim for breach of the covenant of good faith and fair dealing or fraud.

It is apparent that the relief the Brunettis are seeking through their claims of fraud and breach of the covenant of good faith and fair dealing is the recovery of their attorney's fees and costs. **R. 998, p. 478-84; R. 999, p. 529-31; Appellees' Brief at pages 10, 23, 26, 40 & 41.** This remedy is not available under these claims. Therefore, whether or not the trial court erred is irrelevant to the outcome of this litigation and is harmless error, if error at all.

It is clear that the Agreement contains no provision regarding attorney's fees and costs and that no statute allows for the recovery of attorney's fees and cost. If Plaintiffs are to recover their attorney's fees and costs, it must be under an exception to the general rule that fees and costs are not recoverable absent contractual or statutory authority. Collier v. Heinz, 827 P.2d 982, 982 (Utah App. 1992). In Utah the exceptions are narrow. Attorney's fees may be recovered as consequential damages for breach of contract where a defendant's breach "foreseeably causes the plaintiff to incur attorney fees through litigation with a third party." Id. However, this exception is further limited to only those fees incurred in litigation with the third party, not in litigation between the contracting parties. Id. Obviously, this case involves litigation between the contracting parties and this exception is not relevant to this case.

A second exception, and the exception on which Plaintiffs apparently rely, concerns cases involving a breach of the covenant of good faith and fair dealing. Under limited factual circumstances, Utah appellate courts have allowed plaintiffs to recover attorney's fees as consequential damages. This exception is limited to two types of cases. The first are cases

involving a breach of an insurance contract by an insurer. Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989); Zions First Nat'l Bank v. National Am. Title Ins., 749 P.2d 651 (Utah 1988); Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985).⁶ The second are cases involving breach of an implied-in-fact employment contract. Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992). Since this case involves neither an insurance contract nor an employment contract, this exception is inapplicable. Collier, 827 P.2d 984-85.

The trial court found, based upon the facts asserted at trial, that Plaintiffs had not proved a case of fraud against Overland and Holman. Notwithstanding this finding, even if Plaintiffs had proven their fraud claim, they would not be entitled to the attorney's fees damages they were seeking. While consequential damages are allowed in cases involving fraud, these damages are limited to lost profits, damage to good will, expenses incurred in mitigation, lost earnings, prejudgment interest, and loss of interest on loans. Ong Intern. (U.S.A.) v. 11th Ave. Corp., 850 P.2d 447, 457 n. 44 (Utah 1993). There is no exception to the general rule that attorney's fees are not recoverable absent contractual or statutory authority for cases of fraud. Roberts v. Mission Valley Concrete Industries, 721 P.2d 355 (Mont. 1986); Gray v. Don Miller & Associates, Inc., 674 P.2d 253 (Cal. 1984); Annotation, Attorney's Fees as Recoverable in Fraud Action, 44 ALR 4th 776 (1997 Supp.).

⁶ Until 1996, attorney's fees were only recoverable as consequential damages in an insurance case for breach of the covenant of good faith and fair dealing. It now appears that attorney's fees may be recoverable in an insurance case only for any breach of the policy. Billings v. Union Bankers Ins. Co., 918 P.2d 461 (Utah 1996).

C. The Brunettis have not shown that the trial court abused its discretion in refusing to permit them to amend their Complaint at trial or to address additional instances of alleged fraud.

Plaintiffs' argument that Judge Peuler should have allowed them to amend their pleadings to set forth additional facts which they claim support their allegation of fraud is without merit. Throughout this litigation, Plaintiffs' fraud claim has centered around the unfunded \$15,000 initial earnest money check. Until trial, Plaintiffs never attempted to amend their pleadings to assert additional instances of alleged fraudulent conduct by either Overland or Holman. When they tried to introduce such wholly new theories and evidence at trial to support a claim for fraud, Defendants' counsel strenuously objected. Judge Peuler sustained these objections and refused to allow additional evidence of alleged fraudulent behavior. Since this evidence was not admitted, this is not a case to amend the pleadings to conform to the evidence under U.R.C.P. Rule 15(b). With regard to Plaintiffs' fraud claim concerning the unfunded earnest money check, Judge Peuler found that the evidence did not support such a claim.

It is clear that Judge Peuler did not abuse her discretion in denying Plaintiffs' Motion to Amend which was first made at trial. In ruling on a motion to amend, the trial court should consider the motion "in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice." Girard, 660 P.2d 247. Here, by Plaintiffs' own admission, they had knowledge of the facts they sought to add to the pleadings prior to the time when the parties filed their motions for summary judgment in March 1995. They did not seek to amend the pleadings to add these facts until trial of this matter on August 21, 1995. By then, all

discovery and pre-trial motions had taken place. Defendants had prepared their case to address the issue of fraud as it related to the unfunded earnest money check, not any other instances of alleged fraudulent conduct. Plaintiffs' delay in seeking to amend the pleadings combined with the prejudice to Defendants in not being prepared to address those acts due to lack of notice, supports Judge Peuler's decision not to allow amendment. Id.; Debry, 835 P.2d 1009.

Plaintiffs claim that these other incidents of alleged fraudulent conduct were raised with the consent of the parties due to their claimed inclusion in Plaintiffs' Memorandum in Opposition to Overland's and Holman's Motion for Partial Summary Judgment. However, even a cursory overview of Plaintiffs' Memorandum in Opposition show that the facts they now allege support a claim of fraud were raised to support their claim that Holman was the alter ego of Overland, not that asserted facts were additional instances of fraudulent conduct. Further, both Overland and Holman objected to these facts through a Motion to Strike (**R. 321-22**) and disputed these facts in their Reply Memorandum (**R. 256-69**). Therefore, Plaintiffs' claim that these facts were tried to the trial court with the consent of the parties is totally without merit.

CONCLUSION

Based upon the foregoing, Overland respectfully requests that the Court vacate the trial court's grant of partial summary judgment for Plaintiffs, remand this case for a trial on the merits due to the fact that material questions of fact exist, precluding a grant of summary judgment, and limit Plaintiffs' potential damages to \$15,000. Overland and Holman also request that this Court deny Plaintiffs' Cross-Appeal.

DATED this 11th day of December, 1997.

COHNE, RAPPAPORT & SEGAL P.C.

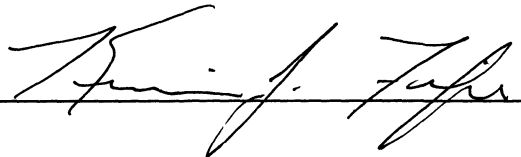

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed two true and correct copies of the foregoing
REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEES, postage prepaid,
this 11th day of December, 1997, to the following:

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