

1978

# Karl Winsness and Associates, A Partnership v. M.J. Conoco Distributors, Inc., A Utah Corporation : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Allen H. Tibbals, Esq.; Attorney for Defendant-Respondent Thomas Duffin and Craig Stephens Cook.; Attorneys for Plaintiff-Appellant

---

## Recommended Citation

Brief of Respondent, *Winsness v. Conoco*, No. 15501 (Utah Supreme Court, 1978).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/936](https://digitalcommons.law.byu.edu/uofu_sc2/936)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION . . . . .	1
NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	2
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	3
ARGUMENT	
POINT I:   The Trial Court's Decision Directing A Verdict Against Plaintiff On Its First Cause Of Action Is Supported By The Evidence Presented And Is Correct In Law . . . . .	6
POINT II:   The Trial Court's Decision Directing A Verdict Against Plaintiff On Its Third Cause Of Action Is Supported By The Evidence Presented And Is Correct In Law . . . . .	15
POINT III:  Judge Leary's Exclusion Of Plaintiff's Exhibit 35 Was Correct In Law Inasmuch As It Was Totally Irrelevant To The Issues Presented At Trial . . . . .	22
CONCLUSION . . . . .	25

## CASES CITED

	<u>Page</u>
<u>Graham v. Street</u> , 270 P.2d 456, 2 Utah 2d 144 . . . . .	9
<u>Jackson v. Colston</u> , 209 P.2d 566, 116 Utah 295 . . . . .	6
<u>Larsen v. Thoresen</u> , 254 P.2d 656 . . . . .	18
<u>Monter v. Kratzers Specialty Bread Co.</u> , 29 Utah 2d 18, 504 P.2d 40 (1972) . . . . .	14
<u>Moore v. Denver &amp; Rio Grande Western Railroad Co.</u> , 292 P.2d 849, 4 Utah 2d 255 . . . . .	7
<u>Naylor v. Solley</u> , 111 P.2d 142, 100 Utah 130 . . . . .	19
<u>Olson et al. v. Warwood et al.</u> , 225 P.2d 725, 119 Utah 175 . . . . .	7
<u>Sharp v. Twin Lakes Corp.</u> , 283 P.2d 611 . . . . .	17
<u>Woodward v. Allen</u> , 265 P.2d 398, 1 Utah 2d 220 . . . . .	19

## TEXTS CITED

	<u>Page</u>
22 Am. Jur. 2d, § 24 . . . . .	8

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

KARL WINSNESS AND ASSOCIATES,  
a partnership,

Plaintiff-  
Appellant,

vs.

M. J. CONOCO DISTRIBUTORS,  
INC., a Utah corporation,

Defendant-  
Respondent.

Case No. 15501

---

BRIEF OF RESPONDENT

---

## INTRODUCTION

In order to facilitate continuity throughout this brief, the parties will be referred to herein either by name or in their respective capacities in the Court below: KARL WINSNESS AND ASSOCIATES - Plaintiff; M. J. CONOCO DISTRIBUTORS, INC. - Defendant.

## NATURE OF THE CASE

This is an action brought by Plaintiff Karl Winsness and Associates against Defendant M. J. Conoco Distributors, Inc. relating to a land lease agreement dated November 24, 1971, and subsequently modified by the terms of a judgment entered April 22, 1974, covering the lease of certain land by Plaintiff to the Defendant, located in Delle, Utah.

Plaintiff-Lessor alleged that Defendant-Lessee breached the lease by failing to run the service station on a 24-hour basis, by incorrectly reporting the gallonage sold at the station, by failing to construct a sewage lagoon, and by failing to keep the station and premises in good repair.

Defendant M. J. Conoco Distributors, Inc. counterclaimed asserting that the Plaintiff had wrongfully encroached upon Defendant's leasehold and intentionally interfered with Defendant's construction of the lagoon system.

### DISPOSITION IN LOWER COURT

Plaintiff filed this action on August 25, 1975. During the pleading stage of this case several amended complaints were filed by the Plaintiff including one on March 22, 1976. Defendant answered Plaintiff's first amended complaint on March 30, 1976, while at the same time filing a counterclaim against Plaintiff.

On June 14, 1977, a jury trial was commenced in Tooele County before the Honorable Peter F. Leary. At the conclusion of Plaintiff's case Defendant moved for a directed verdict as to all five of Plaintiff's counts. Judge Leary directed a verdict as to four of Plaintiff's causes of action but reserved his ruling concerning the first cause of action for later determination. (Tr. A-45 to A-47) At the conclusion of the Court's ruling on Defendant's motion for a directed verdict, the Defendant rested asking leave of the Court to strike and dismiss its counterclaim against Plaintiff, which leave was granted. (Tr. A-48) Additional argument was given by both the Defendant and Plaintiff concerning a directed verdict as to Plaintiff's first count. The Court subsequently granted Defendant's motion as to Plaintiff's first cause of action and dismissed the jury. (Tr. 533-535)

### RELIEF SOUGHT ON APPEAL

Defendant seeks to have the judgment of the lower Court

in favor of the Defendant M. J. Conoco Distributors, Inc. and against Plaintiff Karl Winsness and Associates affirmed.

### STATEMENT OF FACTS

Defendant views the purported statement of facts set forth in Plaintiff's brief as an argumentative exposition of the evidence. Accordingly, Defendant elects to make a brief statement of the facts involved in this case.

Plaintiff and Defendant entered into a land lease agreement dated November 24, 1971, wherein Plaintiff leased certain land to Defendant in Delle, Utah, for the purpose of constructing and operating a service station thereon. (Ex. P-5) Delle, Utah, is located approximately 61 miles from Salt Lake City on the road to Wendover and consisted solely of an old, small cafe, motel and service station. (Tr. 33-34) The present service station is approximately one-half mile from the existing cafe and motel units. There is no permanent housing located at Delle and the only residents are those involved in operating the facilities just mentioned. There is no permanent water supply and all water must be brought in by truck. Subsequent to the signing of the land lease agreement Defendant built its service station which it opened to the public sometime in July, 1972. (Tr. 96)

On October 3, 1972, Plaintiff filed an action in the

Third Judicial District Court of Tooele County, Civil No. 7761, claiming that Defendant had breached the land lease agreement dated November 24, 1971.

At the conclusion of the trial of that action a stipulation was entered into between Plaintiff and Defendant resolving the issues between the parties which included Plaintiff's claim that Defendant had not operated the station on a 24-hour basis. (Ex. P-6)

The stipulation was signed on April 5, 1974, and pursuant thereto a judgment was entered by the Honorable Gordon Hall on April 22, 1974, which incorporated the provisions agreed to by the parties in their stipulation. (Ex. P-7)

The 1974 stipulation required Defendant to build a lagoon sewage system for its new service station and the restaurant facility which was to be built by Plaintiff. (Ex. P-6) Defendant commenced to build the lagoon system and completed same in August, 1974. (Ex. P-38) However, the Plaintiff not having constructed the proposed restaurant, there was never enough effluent to permit final testing and stabilizing of the plastic liner to the lagoon. (Tr. 280-281)

On August 25, 1975, Plaintiff filed the complaint in this action setting forth four causes of action against Defendant. Plaintiff alleged that Defendant had breached the lease agreement and 1974 judgment by failing to operate the service station on



a 24-hour basis, by failing to complete the lagoon system, and by failing to keep the service station in good repair. Plaintiff also demanded an accounting of the number of gallons sold at Delle, Utah, from 1974 to the time the complaint was filed.

On March 22, 1976, Plaintiff filed an amended complaint seeking punitive damages and adjusting upward its damages for counts one, three and four.

Defendant filed its answer to the amended complaint together with a counterclaim on March 30, 1976. Defendant alleged in its counterclaim that Plaintiff had interfered with the construction of the lagoon system and had breached the lease agreement by interfering with Defendant's quiet enjoyment of its leasehold.

Plaintiff filed a third amended complaint on February 10, 1977, which was objected to by the Defendant. (R. 271-284) On April 4, 1977, the Honorable Peter F. Leary entered his pretrial order denying Plaintiff's motion to file its third amended complaint except as to the second cause of action. Following the pretrial order Defendant moved for leave to file an amended answer and counterclaim. (R. 381-388) Judge Leary allowed the filing of the amended answer but denied Defendant's motion to file an amended counterclaim.

A jury trial in this matter was commenced on June 14, 1977, before the Honorable Peter F. Leary at the Tooele County

Courthouse. The issues which remained to be tried after pretrial were (1) Plaintiff's claim that the station was not operated on a 24-hour basis; (2) Plaintiff's claim that Defendant had failed to report the correct amount of gallonage sold at the station in Delle, Utah; (3) Plaintiff's claim that Defendant had failed to complete the lagoon system; (4) Plaintiff's claim that Defendant had failed to keep the service station in good repair; (5) Plaintiff's claim for punitive damages; and (6) Defendant's claim that Plaintiff had interfered with the construction of the lagoon system and had breached the lease agreement by interfering with Defendant's quiet enjoyment of its leasehold.

## ARGUMENT

### Point I

THE TRIAL COURT'S DECISION DIRECTING A VERDICT AGAINST PLAINTIFF ON ITS FIRST CAUSE OF ACTION IS SUPPORTED BY THE EVIDENCE PRESENTED AND IS CORRECT IN LAW.

This Court has held on numerous occasions that it is error for the Court to allow the jury to speculate on the evidence, and that unless there is competent evidence to support a cause of action the trial judge should not submit the question to the jury. In Jackson v. Colston et al., 209 P.2d 566, 116 Utah 295, Justice Latimer speaking for the majority stated:

"It is fundamental . . . that the Court may not permit the jury to speculate concerning defendants'

liability; Dern Inv. Co. v. Carbon County Land Co., 94 Utah 76, 75 P.2d 660; and that the court is required to direct a verdict unless there is evidence from which the jury could reasonably find in favor of the plaintiff."

See also Olson et al. v. Warwood et al., 225 P.2d 725, 119 Utah 175; and Moore v. Denver & Rio Grande Western Railroad Co., 292 P.2d 849, 4 Utah 2d 255.

In the present case Plaintiff's evidence was such that Judge Leary had no choice but to direct a verdict in favor of the Defendant on Plaintiff's first cause of action. While Plaintiff's witnesses testified that on several unspecified occasions the station was closed, not one of them testified as to what caused the closure or the duration of the closure. Plaintiff testified that he did not know why the service station was closed except that the operator on one occasion said he was tired. (Tr. 156) Mildred Sims, after admitting that there had been problems in getting help both at the current restaurant facility, which is approximately one-half mile from the service station, and at the service station, admitted that she didn't know the reason why the station had been closed on several occasions. (Tr. 203) If there was any consistent pattern running throughout all of the testimony given by Plaintiff's witnesses it was that there was always difficulty in getting help at the service station, and that they were not aware of the reasons behind the

service station being closed at various times. Defendant submits that there was no evidence before the Court to aid the jury in determining whether Defendant had breached the lease agreement by not operating the service station on a 24-hour basis. The fact that the station was closed periodically was not evidence that Defendant was not making every effort to run the station on a 24-hour basis. Taking the evidence in a light most favorable to Plaintiff the jury had no guidance as to the number of times the station was closed, the time of day, how long it was closed or the reason for the closure. It would have been pure speculation on the jury's part as to why the station was closed, the duration of the closure, and whether any of the closures resulted in a breach of the lease, or would have been excused as unavoidable. There were no parameters for the jury's guidance in assessing the damages, if any, occasioned by the closures of the station. Any action by the jury to assess damages would of necessity have been entirely conjectural and speculative.

The rule for determination of damages recoverable by a plaintiff is summarized in 22 Am. Jur. 2d, Sec. 24, wherein it states:

"The principle which will not allow the recovery of damages when their existence rests solely on speculation applies both to the fact of damages and to their cause. Thus, a plaintiff cannot recover damages by proving only that the defendant has unlawfully violated some duty owing to the plaintiff,

leaving the trier of fact to speculate as to the damages; he must go further and prove the nature and extent of the damage suffered by the plaintiff and that the breach of duty was the legal cause of that damage. Leaving either of these damage questions to speculation on the part of the trier of fact will prevent recovery. Therefore, no recovery can be had in those cases in which it is uncertain whether the plaintiff suffered any damage. Also, no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from some other source. . . ."

In the present case, Plaintiff failed to show with any degree of certainty that he was in fact damaged. Further, Plaintiff did not introduce any competent evidence that he suffered any damage caused by the isolated closures of the service station.

In Graham v. Street, 270 P.2d 456, 2 Utah 2d 144, this Court held:

"Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered."

The rent provision of the lease reads as follows:

"RENT. To pay to the lessor a monthly 'gallonage' rental on all gasoline and other motor fuel excluding diesel fuel sold to the storage tanks on the premises as follows:

(a) For a period commencing May 15th through and including September 15th of the same year, payment shall be made at the rate of four cents (.04¢) per gallon; for the period commencing September 16th

through and including May 14th of the following year, payment shall be made at the rate of two cents (.02¢) per gallon.

(b) To pay to the lessor as a monthly gallonage rental on all diesel fuel sold at the subject premises for the period commencing May 15th through and including September 15th of the same year, payment shall be made at the rate of three cents (.03¢) per gallon, and for the period commencing September 16th through and including May 14th of the following year, payments shall be made at the rate of two cents (.02¢) per gallon.

(c) In addition to the gallonage rentals above provided for, lessee shall pay to the lessor the sum of \$300.00 per calendar month as 'ground rent' which shall be due and payable in advance on the first day of each calendar month. The \$300.00 ground rent shall be applied first against the \$6,321.15 bill outstanding less payments which have been made on the prior lease dated the 9th day of January, 1970." (Ex. P-5)

There is no evidence whatever in the record to show that Plaintiff had not been paid the exact amount due him under the rental provisions of the lease. It is important to note that the lease does not require the Defendant to sell any particular quantity of gasoline whatever but only to pay to the Plaintiff the agreed upon ground rental and the gallonage rental on the gasoline actually sold. The lease is clear on its face concerning the rental payments and there is no contention by Plaintiff that the Defendant failed to pay rentals in accordance with the lease. Plaintiff complains that if the station had been kept open more, more gasoline would have been sold. This calls for speculation

on two premises; (1) the failure to have the station open was the fault of the Defendant. There is no conclusive evidence on this point; and (2) that had the station been open, more gasoline would have been sold. There is no evidence of any kind on this point. The jury would have been left to unlimited speculation in making a determination of damages on the Plaintiff's claim.

Plaintiff's only witness concerning the damages occasioned by Defendant's alleged failure to operate the service station on a 24-hour basis was Delbert Taylor, who had been a district sales representative for Husky Oil Company. (Tr. 446) Mr. Taylor testified that he had made estimates of the gallonage that several existing service stations owned by Husky Oil should pump if they were operating at full capacity. (Tr. 449-450) He stated that in making his projections he took into consideration location, traffic count and past history. (Tr. 472) He further stated that based upon the traffic count, location and amount of gallonage pumped at the Delle service station in 1971, it was his opinion that the station should pump three times as much gallonage as it was pumping.

The witness also testified that based upon the traffic count, which showed that, for example, the peak traffic at the Delle station on July 10, 1976, occurred between the hours of 11:00 o'clock at night and 12:00 a.m., he determined that the

station should be operated on a 24-hour-a-day basis. (Tr. 459, 462) However, it was later stipulated to by all counsel that Mr. Taylor had made a mistake in reading the traffic count in that the peak hour of traffic was from 11:00 o'clock a.m. to 12:00 p.m., rather than from 11:00 p.m. to 12:00 a.m. as previously testified to by Mr. Taylor. (Tr. A-3) This error is extremely important inasmuch as the witness had testified earlier that his opinion concerning the hours of operation of the service station was based primarily upon the traffic count.

Defendant submits that Mr. Taylor's testimony concerning the service station at Delle was totally lacking in credibility. He stated that if the station were open 24 hours a day it would do three times the business, yet he admitted that he had no personal knowledge of what percent of the time the station was presently open. His testimony concerning the 24-hour operation was based on a traffic count, however he later admitted that he had erred in his reading of the traffic count. He testified that his opinion was based to some extent on past performance, namely 1971, yet he admitted the circumstances had changed drastically since 1971. Further, the fact of the matter is that the station in question was not even built until the middle of 1972. (Tr. 96)

The clearest example of the lack of credibility of Mr. Taylor's testimony is found in reading the transcript of the trial wherein Mr. Taylor, in answer to a question posed to



him by Plaintiff's own counsel concerning the projections he had made for other gas stations, stated:

"Well, the projections I made for the service station, of course, I knew every aspect about the particular location. . . . That's every aspect. I knew the past history of them, I knew what the operator was like, I knew what the upkeep and maintenance of the service station, I knew what it looked like, I knew what the location was; whether or not it was easy to get in and out of, and everything that was in consideration. . . . That way I could pick and choose it much better." (Tr. 505)

In regard to the service station at Delle, Mr. Taylor admitted that he knew very little about the station or the conditions existing there with exception of the traffic count which he had misinterpreted. This witness' testimony lacked the credibility to permit submission to the jury. The Court, as a matter of law, could not submit this testimony, flawed as it was by the error in reading the traffic count on which Mr. Taylor based his computations and his admitted lack of knowledge of the other factors which he testified were essential to an adequate evaluation. It is further to be noted that Plaintiff did not offer any correction or revision of the testimony of this witness after these fundamental errors were manifested. The Court, therefore, had no choice but to take this matter from the jury as there was no other evidence from which the jury could draw any conclusion as to the purported loss of business.

In 1972 Justice Ellett wrote the following concerning speculative damages:

"If there is substantial evidence to support the findings upon which the judgment is rendered, the judgment must be sustained. The fact that it is difficult to calculate damages will not prevent an injured party from recovery. However, a judgment cannot be based upon mere speculation. . . Kratzer lost one day's sale of bread because of the wrongful eviction; but since it was in business after a few hours' delay, it is not possible to say with any degree of certainty how much damage was caused to it other than the loss of the sale for that one day. Under the evidence given in this case any other damage which can be ascribed to the wrongful conduct of the appellant is purely speculative." Monter v. Kratzers Specialty Bread Co., 29 Utah 2d 18, 504 P.2d 40 (1972) (Emphasis added)

In the Kratzer case, supra, there was a wrongful eviction which resulted in some definable damage from the bakery being closed. In the case at bar there is no evidence of the exact time when the station was closed, why the station was closed, or how long it was closed. For the trial judge to have permitted the jury to speculate not only as to whether there was a breach of the lease, but the duration of the breach and the damages resulting therefrom, if any, would have allowed a degree of speculation and conjecture which this Court has never permitted.

Defendant submits the calculation of damages, if any, by the jury in this case would have been impossible and that Judge Leary followed clearly established principles of law as

set forth in the cases cited above by granting Defendant's motion for a directed verdict as to Plaintiff's first cause of action.

## Point II

THE TRIAL COURT'S DECISION DIRECTING A VERDICT AGAINST PLAINTIFF ON ITS THIRD CAUSE OF ACTION IS SUPPORTED BY THE EVIDENCE PRESENTED AND IS CORRECT IN LAW.

Plaintiff's third cause of action was for an alleged breach of the lease agreement as modified by a stipulation and subsequent judgment entered April 22, 1974. Plaintiff contends that Defendant had failed to complete the lagoon system called for in those two documents. Defendant answered asserting that it had, in fact, built the lagoon system and that any delay in its completion was the result of governmental agencies and the Plaintiff, whose actions were beyond the control of the Defendant.

The provision of the 1974 judgment which relates to the lagoon system reads as follows:

"The lagoon system provided for under the terms of this Stipulation shall be designed and constructed at the sole expense and cost of Defendant. Said lagoon system will be constructed in a square configuration which square shall be twenty (20) feet wider than the width of the ponds presently engineered by Nielsen and Maxwell Engineers. The lagoon system shall be designed and constructed to comply with the minimum requirements of the State of Utah and the County of Tooele. All expenses and costs of maintenance and operation of the lagoon system after completion of construction shall be borne equally

by the parties. Each of the parties shall bear their own costs of connecting their respective facilities to the pump station.

"That Defendant will commence construction of the lagoon system at Delle, Utah, within a reasonable time after execution of this Stipulation and will complete the same within one (1) year from March 8, 1974, except as may be excused due to acts of God, or other causes beyond the control of Defendant." (Ex. P-7)

Following the 1974 judgment Defendant began to construct the lagoon system and in fact the system was completed in August, 1974. (Ex. P-38) From August, 1974, until the time of trial Defendant had attempted to get final approval from the State Department of Health which has been denied for various reasons. Plaintiff produced no evidence at trial to dispute the fact that Defendant had indeed constructed a lagoon system as required by the stipulation. Instead, Plaintiff argued that Defendant had breached its duty under the stipulation because final approval had not been given on the system by the State Board of Health. (Tr. 403, 407)

Plaintiff called Art Maxwell who was the original engineer hired to develop the plans for the lagoon system. On cross-examination Mr. Maxwell gave the following testimony concerning the feasibility of operating a lagoon system using only the waste water from the existing service station:

"Very difficult, unless you--unless you pumped in or brought in from some other sources some to start it.

"That 2,000 gallons a day would-- would strike a level some place where as the surface area increased the evaporation would increase, and it would start taking up its full 2,000.

"Basing the 5,000 gallons on a need for two ponds, it would appear that through the winter months that would build up to perhaps five feet of depth in one pond; just taking 40 percent of the total area.

"And in the summer months it would probably reduce that down to where you may have less than three feet.

"At best I would say the operation would be very difficult with only a service station under full water supply; yes." (Tr. 280-281)  
(Emphasis added)

The State Division of Health recognized this problem and allowed Defendant to construct a small lagoon within the first lagoon to handle the waste water until the restaurant facilities were built. (Ex. P-47, paragraph 5)

Defendant's construction of the lagoon system, at the very least, substantially complied with the provisions of the 1974 stipulation. The doctrine of substantial performance well stated by the Nevada Supreme Court in Sharp v. Twin Lakes Corp., 283 P.2d 611, wherein Chief Justice Merrill ruled:

"It is now well established as the general rule with respect to building contracts that the law implies a substantial rather than a literal or exact performance of the terms of the contract. See Lloyd on the Law of Building and Buildings, 2d Ed. Sec. 31, 39; 9 Am. Jur. 30, Building and Construction Contracts, Sec. 40; Annotations 24 L.R.A.,

N.S., 327; 134 Am. St. Rep. 679. It would seem to follow, a fortiori, that a covenant by a lessee to make improvements upon the leased premises is to be given a reasonable interpretation in the light of the purposes to be served and the result sought to be accomplished and that, as against the lessor, substantial compliance with the covenant is sufficient."

See also Larsen v. Thoresen, 254 P.2d 656. The Sharp case, supra, is similar to the case at bar in that it involved a covenant by a lessee to make certain improvements to the leased property.

Again the testimony at trial was that the lagoon system had been built since 1974 but the requirements for final approval had not been met because the system could not be made operable until the restaurant facility was built. The Defendant submits that the requirements of the 1974 stipulation were met by Defendant in that a lagoon system was built to dispose of the sewage from both the existing service station and the restaurant facility which was to be built by Plaintiff. If there was a breach, it was on the part of the Plaintiff and not of the Defendant. The fact that one of the considerations for Defendant's building of the lagoon system was Plaintiff's representation that he would build a restaurant is uncontroverted. The stipulated judgment reads as follows:

"That Karl Winsness & Associates shall furnish to the Defendant at no cost an easement and sufficient land to allow a lagoon

system to be constructed upon the premises of Karl Winsness & Associates at Delle, Utah, said lagoon system is to serve Defendant's existing service station and the new restaurant to be constructed in the future by Karl Winsness. . . It is expressly understood that the lagoon system is to serve the Defendant's service station and the new restaurant to be built by Karl Winsness only and that no other facilities or improvements will be connected to said lagoon system except other facilities mutually agreed upon at the new site, which will not overload the lagoon system." (Ex. P-7)

An analogous situation to the one presented in this case is one of the Uniform Real Estate Contract. A Uniform Real Estate Contract provides that upon the payment of the entire consideration for the property the seller must provide marketable title to the buyer. However, until the buyer has paid for the property in full the seller is under no such duty. See Woodward v. Allen, 265 P.2d 398, 1 Utah 2d 220, and Naylor v. Solley, 111 P.2d 142, 100 Utah 130. In the present case Defendant had a duty to build the lagoon system which it did. However, the duty on the part of the Defendant to have the system approved for operation should not exist until there is a restaurant to use the facility, just as the duty to give marketable title under a Uniform Real Estate Contract does not exist until all of the payments are made. For Judge Leary to have allowed the Plaintiff to force the Defendant to expend an additional several thousand dollars on a lagoon system that is

inoperable without the restaurant facility would certainly have been error.

Even if, for the sake of argument, the Defendant was technically in breach of the 1974 stipulation, Plaintiff was not damaged in any way as a result of said breach. During cross-examination Karl Winsness gave the following testimony concerning the present condition of the lagoon system:

"A. Now, assuming all of that work needed to be done, couldn't that be done in the space of two weeks?

A. I don't know. I imagine it could. We'll have an expert I imagine testify on it. I talked to a gentleman in regards to it, the cost of it and the time on it. I don't know. I imagine. I've had experience with this before and we've never complied with anything I've asked them to do before, so--

Q. Well, now, I'm not asking you whether you asked them to comply with it. I'm asking you if it isn't reasonable to assume that these changes could be accomplished in the length of time which it would require you to construct your restaurant.

A. Well, yes. They could be in the time I construct it; yes." (Tr. 145-146) (Emphasis added)

When asked about why he had not built the restaurant

Mr. Winsness answered as follows:

"Q. That's all. Now Mr. Winsness, had you at any time ever applied for a building permit for your restaurant?

A. Yes.



"Q. When?

A. 1971, I believe.

Q. Was it granted?

A. Yes.

Q. So then you had a proper building permit to go ahead and build?

A. Yes.

Q. And did the Board of Health ever tell you that you could not build your facility?

A. They didn't tell me I could not build it; no." (Tr. 154-155)

From Karl Winsness' own testimony it is clear that the decision not to build the restaurant was Plaintiff's and no one else's. Had the Plaintiff begun construction of the restaurant by his own admission, there would have been little difficulty in completing the necessary adjustments in the lagoon system far in advance of the restaurant's completion. Until the Plaintiff constructs a restaurant facility to comply with the clear understanding stated in the 1974 stipulation there should be no duty placed upon the Defendant to have the system finally approved for operation inasmuch as there won't be sufficient sewage to operate it.

The fact is that Plaintiff has suffered no damage whatever as a result of the lagoon system not being approved by the Board of Health. Until there is a restaurant to use

the lagoon system the lack of final approval of the system is of no consequence to Plaintiff.

### Point III

JUDGE LEARY'S EXCLUSION OF PLAINTIFF'S EXHIBIT 35 WAS CORRECT IN LAW INASMUCH AS IT WAS TOTALLY IRRELEVANT TO THE ISSUES PRESENTED AT TRIAL.

Rule 45 of the Utah Rules of Evidence adopted by this Court on February 17, 1971, and effective July 1, 1971, gives a judge considerable latitude concerning the admission or exclusion of evidence. Rule 45 reads:

"Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered."

Exhibit 35 offered by Plaintiff was a chart purportedly showing the gallonage sold at Delle, Utah, in 1972. Plaintiff claimed at the time of trial and later in its brief submitted to this Court that Exhibit 35 was meant to be used to establish a basis for comparison from which the jury could find the gallonage which the now-existing service station at Delle would pump if operated on a 24-hour basis. (Tr. 133-134 and Plaintiff's

brief, page 29) However, Plaintiff cannot have its cake and eat it, too. Paragraph 8 of the 1974 judgment upon which Plaintiff relies reads in part as follows:

"That Karl Winsness & Associates and M. J. Conoco Distributors, Inc. hereby mutually release and waive any rights, claims or causes of action that either party may have or claim against the other for any alleged breach of any of the terms of the written lease of the parties dated the 24th day of November 1971[,] [p]rior to the date of this Stipulation[.] [S]aid mutual release and waiver shall include but not be limited to the following claims: . . . (8) failure to keep the station open 24 hours a day." (Ex. P-7) (Emphasis added) [sic] - correction of manifest typographical error in judgment

Plaintiff has also stated in its brief at page 2:

"In 1972 a dispute arose between the plaintiff and defendant as to the interpretation of this leasing agreement. An action was filed in the Third Judicial Court of Tooele County, Civil No. 7761, by plaintiffs asking for certain remedies against defendant. Plaintiff charged that the defendant had failed to maintain 24-hour-a-day service, had failed to pay rent as provided in the contract, and had failed to build a sewage lagoon as agreed upon in the leasing contract." (Plaintiff's brief, page 2) (Emphasis added)

Plaintiff cannot with consistency claim that in 1972 the service station was not being run on a 24-hour-a-day basis and then propose an exhibit consisting of the gallonage sold in 1972 as evidence of what the present sales would be if the station were kept open 24 hours a day.

An additional deficiency in Exhibit 35 is that it lacks credibility for other reasons: (1) Karl Winsness testified at trial that the new service station was opened sometime in July, 1972. (Tr. 96) Therefore, Exhibit 35 represented gallonage sold at the old service station during the first six and one-half months of 1972; (2) the old station was adjacent to the existing restaurant facilities at Delle, which are approximately one-half mile from the new service station; (Tr. 33) (3) during 1972 the construction of the freeway was proceeding with many employees using the service station solely for this reason; (Tr. 163,227) (4) the gasoline or energy shortage developed in late 1973 thus making comparison with 1972 figures precarious as the traffic patterns changed; (Tr. 234-235) and (5) Exhibit 35 shows the gallonage sold at Delle skyrocketed during July and August, 1972, only to fall off drastically in October, November and December of that year. Marvin Baird, the operator of the service station and restaurant facilities at Timpie, Utah, was called as a witness by Plaintiff. He testified that his facilities are approximately seven miles from Delle and were first opened in October, 1972. (Tr. 325-326) Correlating the above-mentioned changed conditions with Exhibit 35, it becomes apparent that during the vast majority of the period represented by Exhibit 35, the conditions that affected the amount of gallonage sold were entirely different than those

existing during 1974 through 1977. There is no way that validity could be given to this proposed Exhibit 35 for the purpose which Plaintiff offered it.

### CONCLUSION

It was the duty of the Plaintiff to present a prima facie case concerning the Defendant's breach of the lease agreement as modified by the 1974 stipulation. This it did not do, either as to the operation of the station or the building of the lagoon system.

The record is conclusive in that not one shred of evidence was presented by Plaintiff to establish that the Defendant was not operating the service station on a 24-hour-a-day basis. None of Plaintiff's witnesses could testify as to why the station had periodically been closed. Delle, Utah, is an isolated outpost between Salt Lake City and Wendover, Utah, a result of which is that the closures could have been for numerous reasons that would not have constituted a breach of the lease by Defendant. There was simply no evidence presented upon which the jury could have concluded that a breach had, in fact, occurred.

Plaintiff also failed in its attempt to show the amount of damages, if any, occasioned by the closures of the station. The testimony of Plaintiff's only witness concerning damages was incompetent and totally lacking in credibility. The jury would

therefore have been left to speculate, not only as to whether a breach occurred, but also what damages were suffered by plaintiff as a result of the breach.

Exhibit 35 lacked any credibility whatsoever and was therefore properly excluded by Judge Leary pursuant to Rule 45 of the Utah Rules of Evidence.

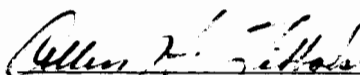
The testimony concerning the lagoon system was that it has been built since 1974, waiting for Plaintiff to construct its restaurant. The decision not to build the restaurant has been Plaintiff's alone and until Plaintiff has a reason to use the system, a lack of final approval by the Board of Health is of no consequence to Plaintiff.

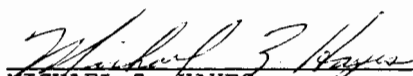
Judge Leary was compelled in this case, given the total lack of evidence presented by Plaintiff, to grant Defendant's motion for a directed verdict as to all five of Plaintiff's counts, which he did. The trial judge, under the standards heretofore applied and recognized under the law in acquitting his duty to evaluate the evidence submitted by the Plaintiff to determine whether a prima facie case had been made, had no choice but to grant Defendant's motion for a directed verdict on all five counts of the complaint. Plaintiff admits the validity of the court's action as to three of the counts. The two counts on which the Plaintiff challenges the lower court's action were equally flawed.

The carefully considered decision of the lower court is not only correct in law but applied sound and recognized moral and ethical standards in evaluating the contractual relation between the parties. The result achieved by the court's decision is just and equitable. The decision of the lower court should be sustained.

Respectfully submitted,

TIBBALS AND STATEN

  
ALLEN H. TIBBALS

  
MICHAEL Z. HAYES

Attorneys for Respondent

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two copies of the Respondent's Brief to Thomas A. Duffin, Suite 510, Ten Broadway Building, Salt Lake City, Utah, and to Craig Stephens Cook, 3645 East 3100 South, Salt Lake City, Utah, this 30<sup>th</sup> day of June, 1978.

