

1988

Lawrence J. Bell, et al v. Reed A. Elder, Ronald O.
Elder and Allen G. Elder, and the City of Enoch,
Ltd. : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

LAWRENCE J. BELL, et al,

Plaintiff and
Appellant,

vs.

REED A. ELDER, RONALD O.
ELDER and ALLEN G. ELDER,
and the City of Enoch, Ltd.,

Defendants and
Respondents.

BRIEF OF APPELLANT

No. 880202-CA

Priority No.: 14b

Appeal from the Judgment of the District Court
of Cache County, State of Utah
Honorable Venoy Christoffersen, Judge

STATEMENT OF JURISDICTION

The Judicial Code of the Utah Code Annotated §78-2a-3
entitled "Court of Appeals Jurisdiction" states as follows:

(2) "The Court of Appeals has appellate
jurisdiction, including jurisdiction of
interlocutory appeals, over:

.... (h) cases transferred to the
Court of Appeals from the Supreme Court."

This appeal is taken from a Judgment rendered in the
District Court of Cache County. It was transferred to the
Court of Appeals from the Supreme Court, and is therefore
properly before this Court, which has Appellate Jurisdiction.

STATEMENT OF NATURE OF THE PROCEEDINGS

The Appellants brought an action for breach of contract
against the Respondents, in the First Judicial District Court

of Cache County. That Court denied the plaintiffs-appellants any recovery, and granted Judgment in favor of the defendants-respondents.

STATEMENT OF THE ISSUES

The issues presented by this Appeal are:

1. Did the Court err as a matter of law in its finding #8, that the Respondents were not in breach of Contract because it was the Appellant's responsibility under the supplemental agreement to be in a position to put water to beneficial use before the Respondents had a obligation to perform under their contract.

2. Did the Court err in its findings #9 that on October 15, 1980 the Respondent's were in a position to furnish culinary water to the Appellant's property line pursuant to the terms of a supplemental agreement to a Uniform Real Estate Contract.

3. Did the Court err in its finding #10 that there was no value to installing water lines to the property until the Appellant's could put the water to beneficial use.

STATEMENT OF THE CASE

In the summer of 1976, the Appellant Larry Bell was a Captain in the United States Air Force, assigned to Eileson Air Force Base, in Alaska. At that time the Respondents Reed and Ronald Elder were in the construction business and had been the successful bidders to refurbish the base family

housing units. The Appellants and Respondents became acquainted through their joint church activities. (T-52) During this summer Appellants learned that Respondents owned 200 acres in Cache County, Utah which they planned to develop as a multi-residential development. During the holiday season the Bell's visited his in-laws, Mr. & Mrs. Waldron in Logan, Utah. Mr. Waldron's background included a number of years as Vice-president of Logan Savings & Loan Association during which time Logan Savings had several business dealings with the Elders. (Tr. 188) Upon learning of the proposed development from his son-in-law, in January 1977, Mr. Waldron entered into negotiations with the Elders, who were also again in Utah, for the purchase of ten acres of this property. The culmination of those negotiations was Exhibit 1, a Uniform Real Estate Contract, dated February 7, 1977, which had been sent to Appellants in Alaska for their signature. (Tr. 189, 190) The pertinent term of that contract is the following portion of paragraph 11:

"The seller hereby agrees and warrantys to furnish water and electrical power, roads to this property by July, 1978. If Buyer is unable to obtain building permit by July, 1978 the Seller agrees to indemnify and repay this contract for six months".

In the spring of 1977 the respondents undertook the development of the property by retaining Mr. Lund, an engineer, to do the work needed to obtain approval from the Cache county planning commission for a planned unit development. (Tr. 178)

The former Cache county planning director, Kenneth Sizemore and Mr. Lund testified that the ten (10) acres purchased by the Appellants were part of this overall development, and the planned source of culinary water for the development was a well known as the "Griffin Well". It is clear from the testimony of Mr. Sizemore and Mr. Lund that this was the only planned source of water to Appellants property until November of 1979. (Tr. 27, 182)

Mr. Sizemore further testified that in February of 1977 the property purchased by Appellants was zoned agricultural, and required a minimum lot size of 10 acres to build a single family home. However, zoning regulations were amended after July 1978 to allow building on half acre lots, subject to approval by the planning commission, and only upon prior proof that adequate culinary water was available. (Tr. 28, 29) The evidence of this availability of Culinary water was an appropriation document from the State Water Engineer. (Tr. 44,45)

In November of 1978 a supplemental agreement, Exhibit 2, was executed by the Appellants and Respondents. Once again the terms of that agreement were negotiated between Mr. Waldron and the respondents, and subsequently mailed to the Appellants for their signature. (Tr. 191, 192) When the parties signed Exhibit 2, the following changed conditions existed: (1) the respondents had been unable to comply with the conditions of paragraph 11 of Exhibit 1; (2) The July 1978 Cache County zoning regulation changes were effective

and no building permits were being granted without a showing by the State Water Engineer that adequate culinary water was available to the property; and (3) The ten acres purchased via Exhibit 1 had been divided into two, five acre plots, 5 owned by the Appellants and 5 owned by the Waldrons, as noted in paragraph 1 of the supplemental agreement. Paragraph 4 of that agreement provided that if the sellers are unable to furnish these utilities, on or before October 15, 1980, the sellers agree to "indemnify and repay this contract within six months", ie by April 15, 1980. (Ex. 2)

Mr. Sizemore's testimony also clearly evidences that the Appellants could not have obtained a permit to build on their five acres at the time the supplemental agreement was signed for reasons set forth in his letter Defendants exhibit 8, as well as in his testimony (Tr. 31, 32 & 34-35)

Respondent Reed Elder testified that when he signed the supplemental contract, Respondents knew: (1) That the original 10 acres were divided into two five acre parcels; (2) That Appellant's could not get a building permit for construction on a five (5) acre parcel, (3) That respondents agreement to provide water to those five acre parcels was not dependent on the appellants ability to obtain a building permit. (Tr. 226, 227) He further testified that at the time the supplemental agreement was signed, the anticipated source of water for the Appellant's property was a certain "unnamed spring". (T-158), However at this time, that spring was not developed, and the Respondents would have had to

build a catch system for the water, provided a way of diverting water out of the area, and to have taken the water from the catch system to the edge of Appellants property. (T-211, 212). He further testified that no catch system was built by Respondents, and none was built at all until 1983.

The State Water Engineer for Cache County, Robert Farthingham, testified about the history of Respondent's application for water from this unnamed spring, the springs water flow, and about the beneficial use of this water. His testimony established that an application was originally filed by Respondents in June 1977 to appropriate water of the unknown spring under application #25-7169. In that application the Respondents stated that the beneficial use applied for was for the "irrigating of half an acre, using the water for one family, five cattle and horses". Pursuant to this application, Respondents were required to put the water to beneficial use by July, 1980. Because that had not been done, the State engineer on July 17, 1980 directed a letter to the Respondent, Ronald Elder advising him that he had fourteen (14) days to submit proof on the application or it would lapse. (Ex. 9, Tr. 88-90). Based upon this letter the Respondent Reed Elder, on July 31, 1980 requested a reinstatement of extension of time in which to prove up the application and noted in that request:

"Use has been limited to only pasture watering due to county holding up our plans for development for the time. We plan use still in the future".

The fact that Respondents had not put the water to beneficial use was supported by the stipulation of Respondents counsel that his clients did not have the water appropriated, and that it was never put to a beneficial use by the Respondents. (T-93,94) Subsequently on July 31, 1982 Reed Elder submitted another request for a reinstatement and a extension of time in which to prove up the application. (Ex. 11) Based upon the records of the State Water Engineer, from the date the application was filed in 1977 until July of 1982 nothing had been done by the Respondents to develop the unknown spring to use the water in a beneficial way.

Mr. Farthingham also testified that on October 6, 1987 he tested the adequacy of the water flow from this "unnamed spring". On that date the only improvement to the spring was a collection line system, apparently constructed in 1983 by a Ron Foster, running to his home. There was no holding tank or any other development of this unnamed spring. (Tr. 99) Mr. Farthingham was unable to adequately drain the system to measure the spring water flow because as the water drained from faucets in the home it became turbid. Mrs. Foster who was present during the test was concerned because she could not bathe the children or wash her clothes in the dirty water. (Tr. 84) Mr. Farthingham testified based upon the test which he was able to conduct, the water flow, measured out of three taps in the home, was 6.40 gallons per minute, which meant that the spring was probably flowing less than

that. His conclusion was that the flow of the unnamed spring into the Foster home did not comply with the water engineer's recommendations for culinary water to a household. (Tr. 85) He also testified that there was no other point of diversion from the unnamed spring except to the Foster home, and that it was questionable whether an additional use of the water for other households could be made. (Tr. 99) Mr. Farthingham also testified that if water from the unnamed spring had been piped to Appellant's property line on October 15, 1980, and had been terminated with a faucet above the ground, this would have met the requirement for putting the water to a beneficial use. (Tr. 108)

Steve Weaver of Weaver Construction Co. testified regarding the construction necessary to bring the water from the unnamed spring to the Appellant's property line and its related costs. (Ex. #4) His testimony that there had been no substantial improvements of the water system corroborated that of Mr. Farthingham. (Tr. 128, 130) He further testified that a concrete holding tank capable of holding at least 3000 gallons needed to be constructed (Tr. 131), a 2½ inch line running 2200 feet, would need to be installed at least 4 feet deep, (Tr. 130, 131), that substantial dynamiting and excavations would be required due to large rocks and conglomerated, (Tr. 129), that a pump station was required to get pressure of at least 40 pounds pressure in the line. (Tr. 132) The total cost for the project was estimated to be \$50,700.00, with a total construction time of approximately 30 to 45 days. (Tr. 133, 134)

Jay Griggs, a retired design engineer with the Corp of Engineers testified he had purchased property from the Respondents and had built his home on land located above that owned by Appellants. In building his home he had been involved in bringing a water system to his home, and had constructed his own 2,000 gallon holding tanks for his system. He testified that in his opinion the method and type of construction as outlined by Mr. Weaver was the correct one that was needed to bring water to the Appellant's property. (Tr. 282, 287-289) He further testified that the use of explosives would be absolutely essential in the construction phase, and that a gravity flow system could not be established based on the differences in the elevation of the unnamed spring compared to that of Bell's property, and the difficulty in insuring an adequate water flow with such a system at that location. (Tr. 294, 295) Mr. Griggs further testified there were no other sources of storage for the unnamed spring water, in that the two water storage facilities in the area mentioned as potential storage sources in Reed Elder's testimony, stored water from other waters sources, were owned by persons or entities other than Respondents, and no agreements existed granting others use of their holding tanks. (Tr. 293,294)

In contradiction to the testimony of Mr. Weaver and Mr. Griggs the Respondent Reed Elder, testified in support of the claim that Respondents were always able to furnish water to the property line of the Appellants pursuant to the

requirements of Ex. #2. The essence of the Respondents position was that had the Appellants requested a building permit, that the Respondents would have then furnished water from the unnamed spring to the Appellant's property. (Tr. 167) That Respondents did not run a water line to the edge of the property because the water rights would have been lost after an assignment of water had been made. When cross-examined, regarding the construction needed in October 15, 1980 to bring the water line to the Appellant's property line, Reed Elder testified that he only would have had to build lateral drainage lines to a larger source of storage. (Tr. 169, 170) That the source of the needed water storage would have been what is called the Nephi commish spring. He further testified that the Respondents would have connected to that storage via a 1 inch line on the road. Once again however the Respondent (Tr. 158) testified that he had not put water from the unnamed spring to a beneficial use as of November 1978. That as of October 15, 1980, to provide water to the Appellant's property, because the spring was not improved, lateral drainage lines would have had to be installed to run water into a storage source, and then a line parallel and below the west side of the dirt road needed to be laid to the property. (Tr. 162, 170) This of course supported the opinion of Mr. Weaver that the best way to construct the water line was along that same road. The Respondent also agreed with the testimony of Mr. Weaver and Mr. Griggs that a pump system needed to be installed

somewhere along the water line to push the water to Appellant's property. With regard to the water line, the Respondent testified that he felt he might have tried to connect a line from the storage source to an old 1 inch line that had previously been laid in the road although he was not sure if that line was in the ground or usable. (Tr. 172) Mr. Griggs' testimony on this issue was that the 1 inch line was no longer available, and had been partially removed, and had only been laid along the road to a depth of no more than 11 to 12 inches rather than the four foot depth needed. The Respondent also acknowledged that a line larger than a 1 inch line would have to be installed to handle the pumping difficulties. Mr. Elder further acknowledged (Tr. 173) that he did not own or have control over the commish water storage facility, or any other water storage facility in the area, and did not have any written agreements which would allow him, during any of the period of time in question, the use of any other water storage facility. The testimony of Reed Elder was clear that on October 15, 1980, Respondents had not put the water from the unnamed spring to beneficial use, had not perfected the water rights, had not done any improvements on the unnamed spring including building a storage facility. (Tr. 231) Mr. Elder on cross-examination also admitted that his first discussion about using a holding tank system belonging to somebody else for the storage of water from the unnamed spring was not until sometime between 1982 to 1985 (Tr. 233).

The Appellant, Larry Bell testified that he was concerned with water being available to the property by the deadline contained in Exhibit #2 because the property was essentially worthless without water. (Tr. 57) Mr. Bell further testified that every year after his separation from the Air Force in June of 1977, he had discussed with the Respondent Ron Elder, the status of the watering system. (Tr. 66) He further testified that after July of 1978, he had indicated to Ron Elder that he was going to list his property for sale, and that he needed water to do it. That after he had listed the property for sale in September 1981, there had been several inquiries concerning the property, but because of the uncertainty of the availability of water it could not be sold. (Tr. 67, 68, 134, 143, 147). Mr. Bell further testified he had paid \$12,500 for the property.

Dr. Lynn Davis, an Agricultural Economist testified that the value of the property as of the date of trial (October 8, 1987) was \$200.00 per acre. That when purchased the value of the property without water, etc was \$500.00 an acre. (Tr. 204)

SUMMARY OF ARGUMENTS

POINT I.

The lower Court erred as a matter of law in its determination a condition precedent to Respondents obligation to furnish water to the property line was Appellant's responsibility under the supplemental agreement to be in a position to put water to beneficial use.

POINT II.

The lower Court ruled contrary to Utah law in making its finding that Respondent's were in a position to furnish culinary water to Appellant's property line pursuant to their obligation under paragraph 4 of the supplemental agreement.

POINT III.

The Court abused its discretion in finding there would be no value to the Appellant's by the Respondent's installing water to the property line based upon the evidence before the Court.

ARGUMENTS

POINT I.

THE LOWER COURT ERRED AS A MATTER OF LAW IN ITS DETERMINATION THAT A CONDITION PRECEDENT TO RESPONDENTS OBLIGATION TO FURNISH WATER TO THE PROPERTY LINE WAS APPELLANT'S RESPONSIBILITY UNDER THE SUPPLEMENTAL AGREEMENT TO BE IN A POSITION TO PUT WATER TO BENEFICIAL USE.

In Rapp v. Mountain States Tel. & Tel. Co., 606 P.2d 1189 (Ut. 1980) the Utah Supreme Court held:

"It is well - settled law that the parties to a contract may, by mutual consent, alter all or any portion of that contract by agreement upon a modification thereof. Where such a modification is agreed upon, the terms thereof govern the rights and obligations of the parties under the contract, and any pre-modification contractual rights which conflict with the terms of the contract as modified must be deemed waived or excused."

The issue before the trial Court therefore, dealt with an interpretation of the terms and conditions of the

supplemental agreement and whether Respondent's breached the contract by failing to perform according to its terms as modified. The Supreme Court In Mark Steel Corp. v. EIMCO Corp., 548 P.2d 892 (Ut. 1976), noted that the:

"Primary rule in interpreting a contract is to determine what the parties intended by what they said; the Court will not add, ignore, or discard words in this process, but will attempt to render certain the meaning of provisions in dispute by objective and reasonable construction of the whole contract."

A determination of whether a breach of contract incurred in this case must focus on determining what the parties intended by the supplemental agreement. A review of that agreement and the testimony before the Court clearly reflects the following:

1. That the supplemental agreement was intended to be a modification of the original Uniform Real Estate Contract.

(Ex. 2)

2. That the supplemental agreement was entered into because the Respondent's were having difficulty performing under the original terms of the Uniform Real Estate Contract.

(Ex. 2)

3. That the Respondent's knew the original ten acre plot had been divided into two five acre plots, that building permits would not be granted for the five acre plots and with this knowledge, agreed to supply at their cost culinary water to the Appellant's five acre plot. (Tr. 226,

227)

4. Paragraph 4 of the supplemental agreement specifically provides that if the Respondents were unable to furnish those utilities on or before October 15, 1980, then the Appellants would be indemnified and repaid under this contract within six months from October 15, 1980, i.e. by April 15, 1981.

The terms and conditions of Exhibit #1 which were no longer applicable because by their nature they could not be when the supplemental agreement was entered into strictly relate to the provision under paragraph 11. Obviously the provisions of paragraph 11 of Exhibit 1 relating to the buyers obtaining a building permit by July 1978 etc., if still effective on November 3, 1978 when the supplemental agreement was signed, were waived by the supplemental agreement and no longer a condition to be considered by the Court. A review of the other terms of the supplemental agreement in no way negate the clear language regarding the Respondents responsibility and their liability upon their breach of the supplemental agreement.

In Land v. Land, 65 P.2d 1248, (Ut. 1980) the Supreme Court noted that "where possible, the underlying intent of a contract is to be gleaned from the language of the instrument itself; and only where the language is uncertain or ambiguous need extrinsic evidence be resorted to."

No such ambiguity was claimed to exist in this case, nor was any asserted. It is therefore submitted that, as a matter of law, the trial Court erred in reading into the

language of this supplemental agreement a condition precedent to the Respondents obligation to perform, namely the condition that the Appellant's had to be in a position to put water to beneficial use before the Respondent's were obligated to furnish water to the property line of the Appellant's.

POINT II.

THE LOWER COURT RULED CONTRARY TO UTAH LAW MAKING ITS FINDING THAT RESPONDENT'S WERE IN A POSITION TO FURNISH CULINARY WATER TO APPELLANT'S PROPERTY LINE PURSUANT TO THEIR OBLIGATION UNDER PARAGRAPH 4 OF THE SUPPLEMENTAL AGREEMENT

A review of the testimony of Mr. Farthingham, and of the certified copy of file no. 25-7169 from the State Engineer's office, relating to the City of Enoch's applications for water rights from the unnamed spring, show:

1. That on June 6, 1977, Ron Elder, filed an application to appropriate water for the City of Enoch. That the application was for the diversion of water from an unnamed spring to be used for the domestic purposes of one family, stock watering of five cattle and used from April 1 to October 31 for irrigation. (Tr. 79)

2. Subsequently, on July 17, 1980, a letter was sent to Ron Elder from the State Engineer advising him that, the City of Enoch had not complied with the requirements of the original application, and such compliance would have to be made by July 31, 1980, or a request for an extension of time

would need to be filed to prevent the application from lapsing. (Ex. 9, R-208)

3. On July 30, 1980, a request for reinstatement and extension of time was filed by Reed Elder. In that request, he noted that the work to improve the spring had not been done, and the water had not been put to beneficial use by July 31, 1980, because:

"The use has been limited to only pasture watering due to County holding up our plans for development for the time... ."

The State Engineer notified Ron Elder on August 29, 1980, that an extension of time for filing proof of appropriation had been granted until July 31, 1982. (Ex. 10, R-209)

4. Again, on May 28, 1982, because proof had not been submitted that the water had been put to beneficial use, the State Engineer sent another letter to Ronald Elder. This letter, once again, pointed out that there had been a failure on the part of the Elders to complete any development of the spring, and noted that the extension application would lapse unless a new request was filed. (R-10)

5. That in response to that letter, an additional request for an extension of time was filed by Reed Elder on June 7, 1982. That in that request, the reason stated for the failure to complete the work of improving the spring, and putting the water to beneficial use was:

"No further action has been taken since the last extension. We are still planning development in the future." (Ex. 11, R-210)

6. The State Engineer advised Reed Elder in a July 8, 1982 letter that the time to file a proof of appropriation was extended to the City of Enoch until July 31, 1985. A memorandum decision of the State Engineer accompanied this letter. In that memorandum the State Engineer advised the City of Enoch/Elders that they had not complied with the provisions of Section 73-3-12, Utah Code Annotated, in that there was not a proper showing of diligence or reasonable cause for delay in proceeding with the proof on the application. (Emphasis added) (R-210)

7. In August of 1982, an additional change application was filed on behalf of the City of Enoch by Reed Elder. Paragraph 8 of that application provided that the diversion of the water was to be accomplished by the construction of a tunnel collection box and a pipeline to the place of use. The purpose of the application was to include two additional families. (R-211 & 212)

8. Once again, on May 31, 1985, a letter was sent by the State Engineer to Reed Elder advising him that, as of that date, no proof of application of the water had been submitted, and that the proof due date was July 31, 1985. Thereafter, an election to file water users claim was duly filed by Reed Elder on behalf of the City of Enoch on July 19, 1985. (R-215)

Based upon the above, it is clear that the defendants had not taken any steps, or undertaken any construction on the unnamed spring to bring water to the plaintiffs'

property, nor had they complied with the provisions of §73-3-12 U.C.A. as of May, 1985, let alone as of November, 1980. Reference is also made to the testimony of Reed Elder, wherein he confirms he had taken no steps to develop the spring. (Tr. 231)

In Sowards v. Meacher, 108 P. 1112, 1113, (1910) the Utah Supreme Court noted:

"To constitute a valid appropriation of water, there must be: an intent to apply it to a beneficiary use, a diversion from a natural channel by a ditch, canal, or other structure, and an application of it to a useful industry within a reasonable time; the last mentioned element being the most essential."

This case has been followed by other decisions where the issue was whether a party perfected an application for water. See Eardley v. Terry, 77 P.2d 363, 365 (1938), where the Utah Supreme Court also held:

"The approval or rejection of the application is simply a preliminary matter and is not intended to, and does not, fix the rights of the parties before the State Engineer in such proceedings... . If the application is approved, then the applicant must proceed to perfect his appropriation as provided by law. Until it is so perfected, he cannot be decreed or given present rights as under a completed appropriation. It may be that, although the application is approved, the applicant may not be able to perfect his appropriation. The mere approval of the application does not assure that an actual appropriation of water will result." (emphasis added)

This position was further supported in United States v. District Court, 238 P.2d 1132 (1951). In that case, the Utah Supreme Court again upheld the proposition that:

"The right to appropriate or change the diversion of use of water is not complete until the appropriation or change has actually occurred, and hence the applicant cannot establish any rights under the application and have them adjudicated at the time the application is approved by the Court."

It is clear, therefore, that in Utah, the approval of an application does not grant any ownership interest or right to the water in the person receiving the application, in this case, to the Elders, d/b/a City of Enoch. The testimony before the Court and certified records of the Water Engineer clearly establish that one application for an extension of time was filed prior to November, 1980, and one in 1982. Also, an application for a change of use was filed by the Defendants before any steps were taken by them in 1985 to prove their claim. The Sowards case clearly states that a diversion from a natural channel by ditch, canal, or other structure must be accomplished before there is a valid appropriation of water. It is, therefore, submitted, that the Defendants, as a matter of law, did not have a valid appropriation of water in November of 1980, nor were they in a position at that time to do so. Certainly they had no diversion of the spring from any natural channel by any ditch, canal, or other structure. It is therefore clear they were unable to furnish culinary water to the Appellant's property line on October 15, 1980, or on any reasonable date thereafter.

POINT III.

THE COURT ABUSED ITS DISCRETION IN FINDING THERE WOULD BE NO VALUE TO THE APPELLANT'S BY THE RESPONDENT'S INSTALLING WATER TO THE PROPERTY LINE BASED UPON THE EVIDENCE BEFORE THE COURT.

The evidence presented to the Court on this issue was from Larry Bell's testimony that in September of 1981 he had listed the property for sale with Coleman Realty in Logan, Utah, but had been unable to sell the property because water had not been provided to the property.

The only other evidence produced on the issue of value was that of Dr. Davis who testified that current use of the property was as marginal grazing land unfenced, and without water and other amenities. He placed the current value at \$200.00 per acre. Dr. Davis, on cross-examination, also testified that the difference in the value of the property if it had water and services to it, compared to the property without would be the cost of actually bringing those utilities to the property. (Tr. 207) Therefore based upon Mr. Weaver's testimony about the cost of the construction to bring the water to the property, \$50,700 would be reasonable.


Based upon the above uncontradicted evidence, it is clear that the Court abused its discretion in finding that there would have been no value to the Appellants by requiring Respondents to furnish the water to the property line pursuant to the supplemental agreement.

CONCLUSION

The Appellant's seek reversal of the trial Court's Findings of Fact and Judgment. They request that this Court as a matter of law render its interpretation of the language of the supplemental agreement, and determine that the Respondents were required, at their expense, to furnish culinary water to Appellant's property on or before October 15, 1980, and that their obligation was not subject to any condition being imposed on the Appellants.

Appellant's further request that this Court, based upon the evidence, determine that both as a matter of law and factually Respondent's were unable to furnish culinary water to the property line of the Appellants pursuant to the terms of the supplemental agreement, and therefore reverse the Judgment of the lower Court and find that the Respondents were in breach of this contract. Further, while it would appear that the lower Court was involved in an "indulgence of paternalism" warned against by the Supreme Court in Park Valley Corp. v. Bagley, 635 P.2d 65 (Ut. 1981) the Appellant should be awarded Judgment based upon the evidence for the \$12,500.00 they originally paid for the property, together with applicable interest thereon, their costs, and reasonable attorney's fees as provided by the Uniform Real Estate Contract.

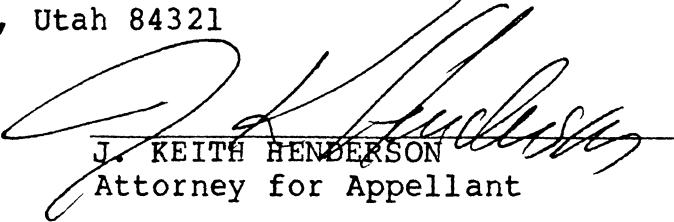
RESPECTFULLY SUBMITTED this 5th day of July, 1988.


J. KEITH HENDERSON
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 1988, I mailed four (4) true and correct copies of the above and foregoing BRIEF OF APPELLANT by placing same in the U.S. Mail postage prepaid and addressed to the following:

Kevin E. Kane
Attorney for Respondent
108 N. Main
Logan, Utah 84321


J. KEITH HENDERSON
Attorney for Appellant