

1977

Paul F. Walton v. Kenneth F. Walton and Fife Rock Products & Construction Company : Reply Brief of Plaintiff and Appellant, Paul F. Walton

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL F. WALTON,

Plaintiff and Appellant,

vs.

KENNETH F. WALTON and
FIVE ROCK PRODUCTS &
CONSTRUCTION COMPANY

Defendant and Respondent.

REPLY BRIEF OF
AND APPELLANT.

Appeal From
Second Judicial District
Honorable Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL F. WALTON,

Plaintiff and Appellant,

vs.

District Court No.
21341

KENNETH F. WALTON and
FIFE ROCK PRODUCTS &
CONSTRUCTION COMPANY

Supreme Court No.
15552

Defendant and Respondent.

REPLY BRIEF OF PLAINTIFF
AND APPELLANT, PAUL F. WALTON

Appeal from a Final Order of the
Second Judicial District Court for Davis County
Honorable John F. Wahlquist, District Judge

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REFERENCES TO PLAINTIFF-APPELLANT BRIEF

All statements heretofore made in Plaintiff-Appellant's Brief as to Nature of Case, Disposition in Lower Court, Relief Sought on Appeal, Statement of Facts and Argument are hereby incorporated or it is intended that the following Arguments be added and made a part of said brief by incorporation.

ARGUMENT

POINT I

THE SUPREME COURT MAY PROPERLY OVERTURN THE FINDINGS AND JUDGMENT OF THE LOWER COURT IF IT FINDS THE EVIDENCE TO BE INSUBSTANTIAL OR INCONSEQUENTIAL AND MAY FIND FOR THE PLAINTIFF-APPELLANT AS A MATTER OF LAW.

Defendant-Respondents under Point I of their brief, on pages 4-8, would have the law be interpreted that any evidence supporting the finding of the trial court is sufficeint.

Beginning on page 6, the brief reads:

"There is substantial evidence in the record to support these findings."

Thereafter the few sparse statements of the Defendant's witnesses and certain correspondence are referred to, including:

1. Mr. Woodland (General Manager of Defendant, FIFE) testimony.
2. Letter of October 7, 1975 from FIFE to Davis County Planning Commission which defendants purport to be their Rehabilitation Plan.
3. Certificate of Occupancy which was issued.
4. The Commissions permitting the \$10,000 bond to lapse.

The evidence defendants fail to present is the Planning Commission's refusal of the rehabilitation efforts following as opposed to their claim that the Commission accepted plans submitted prior to the last date of the lease. The evidence substantially proves otherwise.

The Utah Supreme Court has clearly defined the standard governing evidence in support of the trial court's finding.

From the time-honored and universally accepted rule that a finding or verdict must be supported by substantial evidence, the modifying adjective "substantial" has been used advisably to indicate a higher degree of proof than just any evidence of any kind. The requirement is that the evidence must be sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify some, but not necessarily all, reasonable minds acting fairly thereon, to believe it to be the truth and conversely, if when considered it appears to be so plainly unsubstantial or inconsequential that the Court is convinced that no jury acting fairly and reasonably could so believe it, it cannot properly be regarded as substantial evidence.

Utah State Road Commission v. The Steele Ranch,
533 P.2d 888 (1975)

The following observations are noteworthy about this rule:

(1) The evidence must be substantial in support of a verdict or at least a higher degree of proof than just any evidence of any kind.

(2) The evidence which supports the verdict must be considered in connection with other evidence.

(3) If the evidence which supports the verdict is plainly unsubstantial or inconsequential so that the Court is convinced that reasonable minds acting reasonably could not so believe it, it cannot properly be regarded as substantial evidence and the Court may reverse the findings of the trial Court.

With respect to the judgement of October 23, 1969, there are only two questions that must be answered:

(1) Whether the judgment imposes the duty to comply with the requirements of Davis County Planning Commission upon termination of the lease.

(2) Whether Defendant-Respondents did, in fact, comply with the requirements of the Davis County Planning Commission at that time.

There is no question but that the answer to the first question is in the affirmative because the evidence overwhelmingly indicates that it is Davis County Planning Commission that must determine what Defendant-Respondent's duty is and the Court so held in its judgement. (K.38-40) Davis County Planning Commission has determined that duty as adequately set forth in appellant's brief. If all

evidences could be stripped away except the Memorandum and testimony of Glenn Austin and the testimony and correspondence of Joe Moore, the evidence would establish as a matter of law that defendants did not comply with Davis County Planning Commission requirements. The following statements of "requirements" were made to the defendants by the Davis County Planning Commission using the findings of Davis County Engineer, H. Glenn Austin.

(1) Water running down the roads, through the area have caused considerable erosion.

(2) On the upper end of the pit on the north side there is a sand hill with steeper slopes than the Davis County Excavation Ordinance would allow. The sand is sliding down the sand hill and there is no vegetation starting in the area and considerable wind erosion.

(3) The whole area shows evidence of a need for storm drainage control to prevent erosion.

(4) It would seem that this north sand hill would need to be graded down and topsoil placed on it, then reseeded with some recommended type of vegetation.

(5) Between this gravel pit and the Hall & Gailey pit, there is a steep ridge left between the two pits. I would suggest that this ridge should be graded down, rounded and seeded.

(6) There is along the north-south line of the pit a general area where considerable regrading or revegetation is needed.

(7) One of the big problems, as I see it, for the complete rehabilitation of the pit is the control of storm drainage water which is in its present condition, causing considerable erosion. (See P. 23 the Memorandum of Glenn Austin and P. 24, the letter setting forth Davis County Planning Commission Requirements addressed to Mr. Clifford P. Woodland, Fife Rock Products Company.)

These were found to be the conditions after the defendants had performed three (3) days of very minimal rehabilitation efforts.

Even the testimony of the experts, to-wit, Herb Schreider, Jim Byrd, Guy Michael R. Alder and Burke O. Clegg, at most can be only supportive or descriptive of the damages as found by Mr. Austin and the Davis County Planning Commission. Under the terms of the Judgement of 1969 and the Stipulation of 1967, the duty of the defendants is determined by the Davis County Planning Commission. That duty was clearly spelled out unequivocally and as a matter of law governs the conduct of the defendant. These determinations of May 28, 1976 followed (i) the termination of the lease, (ii) the minimal excavation accomplished on three (3) days in April of 1975 by Mr. Smith and should take priority over Mr. Smith's (defendant Fife's employee) conclusion that the slopes were reduced to the proper steepness.

What the Defendant-Respondents must produce is some evidence to show that the Davis County Planning Commission accepted the rehabilitation efforts of the Respondent-Defendants. Anything short of that would not be adequate evidence and Plaintiff-Appellant must prevail as a matter of law.

POINT II

KENNETH F. WALTON'S OBLIGATIONS AND DUTIES TO
THE PLAINTIFF UNDER THE CAUSE OF ACTION HEREIN
DATE BACK TO MAY 15, 1955.

Defendants in their Brief take a myopic view of the scope of Defendant, Kenneth F. Walton's liability. Apparent throughout the whole litigation, Defendants have taken the view that if they defend only Fife Rock Products and Construction Company, they will be providing the defense for the Defendant Kenneth F. Walton. The Defendant, Kenneth F. Walton, has effectively defaulted in his own defense. He never at any time appeared in the trial, the lease of May 15, 1955 was made part of the evidence (Def. Ex.-1); and the Court found

3. A lawsuit was had between the parties and the court's holding as to the effecting of the lease is contained in the "Judgement" contained in the evidence. That Kenneth Walton was obligated under such lease to "terrace and comply with the planning commissions requirements upon the termination of the lease." This provision, in the general judgement, continued on the relationship that started in 1955 and that the obligation of terrace, etc. would effect not only the diggings taking place after 1967 when the stipulation was made or 1969 when the judgement was entered, but also dates back to 1955 when the digging was first begun insofar as Kenneth Walton is concerned. (R.38)

Yet, Defendant-Respondents take the view, that somehow Defendants are confined to any obligations that accrued since the Defendant, Fife, began their operations sometime in 1966 (See page 2 of Defendant-Respondent's Brief).

POINT III

THE AUTHORITY TO DETERMINE WHETHER DEFENDANT-RESPONDENTS COMPLIED WITH THE EXCAVATION ORDINANCE OF 1960, THE STIPULATION OF JULY 7, 1967, THE JUDGEMENT OF OCTOBER 23, 1969 AND/OR EVEN WHAT DEFENDANTS CALL THEIR REHABILITATION PLAN OF OCTOBER 7, 1971 MAY NOT BE SHIFTED FROM THE DAVIS

COUNTY PLANNING COMMISSION TO MR. SMITH OR MR. WOODLAND.

The Stipulation and Judgement spell out that it is the Davis County Planning Commission that must determine whether Defendant-Respondents complied with the standard for rehabilitation that would preserve the land from wasting or erosion and would be restored to "usefulness and reasonable physical attractiveness" . . . providing protection of the tax base. . . giv(ing) due consideration to the present and future use of the land". (P.3,pp.4-5) It is they who must determine if the area were left "unsightly" or so that it would "permit stagnant water to remain" or whether peaks and depressions had been "reduced to a surface which will result in level or gently sloping topography. . . which will minimize erosion due to rainfall".

Defendant-Respondents attempted to endow Mr. Woodland with this authority.

Mr. Woodland inspected the work and in his opinion there was full compliance with the Rehabilitation Plan given to Mr. Sutton and with the terms of the Judgement. Respondant Brief pp. 3-4.

Mr. Woodland testified that he instructed an employee to take a crew to the gravel pit for three days in April, 1975 (T-309, 360) and comply with the Rehabilitation Plan and remove all steep slopes and grade them to 1 1/2 to 1 angles of repose and that the work was done. (T-362). He stated that he inspected the work and there was full compliance with the Rehabilitation Plan given to Mr. Sutton and the terms of the Judgement (T-313). (Emphasis Added) Respondent's Brief p.7.

Again the evidence must show that the Davis County Planning Commission, not Mr. Woodland accepted the work performed in April, 1975 to "rehabilitate the premises". This they cannot

do, because the evidence, as a matter of law, shows that it was not acceptable after the study made by the Planning Commission on May 28, 1976 (P Exhs. 23 and 24.)

CONCLUSION

The evidence supporting the trial court's finding is "insubstantial" in that they rely upon statements by employees of defendant, FIFE, and correspondence written to Davis County Planning Commission obviously self-serving, even from the beginning. They are "inconsequential" in that they fail to establish as a matter of law that the rehabilitation efforts were accepted by the Commission.

The time span from 1955 on has not been accounted for by defendant, Kenneth F. Walton, who never made any effort to defend throughout the trial. He wholly defaulted thereby.

Defendant's effort to assume the power given by the July 7, 1967 Stipulation and the October 23, 1969 Judgment to the Davis County Planning Commission is illegal and capricious and the Court had no power to grant to said defendants the power to determine the extent of their own responsibilities in rehabilitating the property in question.

Respectfully submitted,

Lyle J. Barnes
Attorney for Plaintiff-Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL F. WALTON,

Plaintiff-Appellant,

vs.

Case No. 15552

KENNETH F. WALTON and
FIFE ROCK PRODUCTS AND
CONSTRUCTION COMPANY,

Defendants-Respondents.

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is a case wherein the Plaintiff-Appellant, Lessor of a gravel pit area, brought suit against the Defendants-Respondents, the Lessee and operator of the gravel pit, for money damages after the expiration of the Lease and the lower Court found no cause for action against either Defendant at the conclusion of a three-day trial.

DISPOSITION IN LOWER COURT

The Lower Court entered Judgment of "No Cause for Action" in favor of Respondents and against Appellant.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the Lower Court's judgment.

STATEMENT OF FACTS

Appellant's "Statement of Facts" is so lengthy and so laced with argument and unsupported conclusions that Respondents are compelled to controvert it in its entirety. To particularize the areas of disagreement would unduly lengthen this Brief. Therefore,

Respondents submit a separate Statement of Facts as follows:

On May 18, 1955 Appellant's predecessor in interest entered into a written Lease Agreement with Respondent Kenneth F. Walton for a period of ten years with a renewal period [Def. Ex. -1]. Shortly after the end of the first ten year period a dispute arose concerning the renewal and litigation was commenced by Appellant's predecessor in interest against Respondent Walton which resulted in a Judgment dated October 23, 1969 [Pltf. Ex. -1]. The pertinent portion of said Judgment provided in paragraph 1 (g):

"That upon the termination of said Lease, Defendant shall comply with the requirements of the Davis County Planning Commission with respect to terracing and will specifically see to it that there are no large caverns or holes left upon the premises."

Subsequent to the Judgment and sometime during 1971, Respondent Fife Rock Products and Construction Company began operations in the gravel pit pursuant to an agreement with Respondent Kenneth F. Walton [T-316]. Many other gravel operators had worked in this pit prior to the time Respondent Fife did so. For example, Reynolds Construction Company in the 1930's [T-291], Parsons Construction Company [T-42, 43], Smedley Construction Company [T-46, T-303] and unnamed others [T-84]. Respondent Fife never expanded the perimeters of the gravel pit area and those perimeters were the same in 1975 when they left the pit [T-307, 329]. During their years of operation there was an on-going and continuous rehabilitation plan being carried out as the work progressed [T-314]. The Davis County Excavation Ordinance [Pltf. Ex. -3] provides in Chapter 6 that the owner or operator of a gravel pit shall submit a Rehabilitation Plan in connection with removal of materials. Mr. Woodland, Operations Manager of Respondent Fife, submitted such Rehabilitation Plan by letter of October 7, 1971 [Pltf. Ex. -11, T-295] to Rodney Sutton, who is now deceased but was then the Davis County Planning Commission Director. A Certificate of Occupancy was then approved and issued by the Planning Commission as approved by Mr. Sutton [T-297]. Following the letter of October 7, 1971, Mr. Sutton called Mr. Woodland and asked for some additional material to complement the Rehabilitation Plan and Mr. Woodland sent him a sketch of the proposed contours as they would exist following the work [Def. Ex. -4, T-299, 300]. Mr. Sutton never asked for anything additional by way of a Rehabilitation Plan [T-301, 302]. Mr. Woodland saw him

on several occasions during the following years while he was still Director of the Planning Commission. Mr. Moore, the present Planning Director, stated that nothing was done by the Planning Commission between December 1971 when the Certificate of Occupancy was issued until the Lease of Defendants expired on May 18, 1975 [T-59]. The gravel pit was never "red-tagged" or shut down [T-86, 87]. Mr. Moore also stated that the Certificate of Occupancy was renewed on October 4, 1973 without objection from the Planning Commission [T-95, 96]. Furthermore, he stated that according to the records, his predecessor, Mr. Sutton, had apparently accepted the letter of October 7, 1971 and the sketch later forwarded to him as an acceptable Rehabilitation Plan [T-97]. The County Commission approved issuance of a Certificate of Occupancy on October 13, 1971 subject to filing of a \$10,000.00 bond [T-97, 98] which bond was filed on November 10, 1971 [T-370] and which ran for three one-year periods to November 10, 1975 at which time it terminated without objection from the Planning Commission or Davis County [T-372, 373]. The bond was for the protection of the Davis County Planning Commission [T-375] but no demand was ever made on the bond by Davis County or anyone else [T-376].

The Planning Commission Director admitted that there was no mention of "terracing" in the Excavation Ordinance and that the Ordinance did not allude to revegetation or planting, that there were no written rules or regulations of the Planning Commission pertaining to terracing, nor were there any rules, regulations, writings or other materials to which an operator could refer and there were not now and never had been any written rules or regulations pertaining to revegetation, reseeding, or planting [T-78, 79] and that he had no authority to regulate gravel pit areas other than as specified in the Excavation Ordinance [T-50, 51, 83].

Just prior to the expiration of the Lease in 1975, Mr. Woodland gave instructions to an employee, Mr. Smith, [T-309] to take a crew to the gravel pit on April 14, 15, and 16, 1975 [T-360] and comply with the letter of October 7, 1971 and remove all steep slopes and grade them to 1½ to 1 angles of repose, as required by the Excavation Ordinance, which was done [T-362]. Mr. Woodland inspected the work and in his opinion there was full compliance with the Rehabilitation Plan given to Mr. Sutton and with the terms of the Judgment

[T-313]. Mr. Smith stated that they reseeded all the disturbed area with crested wheat grass [T-364, 365] and complied with all of Mr. Woodland's instructions [T-365]. Mr. Woodland [T-313] and the Planning Director [T-103, 104] both stated that there was no evidence of any excavating having been done in a careless, negligent, reckless, deliberately destructive or malicious way and, in fact, that the removal met the accepted standards within the County and was consistent with the standards of care employed by other operators in the removal of gravel in Davis County [T-103, 104, 314].

Approximately eight months after the expiration of the Lease, the Appellant brought suit against the Respondents claiming:

1. That both Defendants had violated the provisions of paragraph 1 (g) of the Judgment of October 23, 1969; and,
2. That, as limited by the pre-trial order, Defendant Fife Rock Products and Construction Company had committed waste on the premises under the provisions of 78-38-2, Utah Code Annotated, 1953. [R-32]

The matter was tried to the Court on October 17, 18 and 19, 1977 and the Court issued a Memorandum Decision [R-28, A-1] on October 27, 1977 entering a "No Cause for Action" in favor of both Respondents. Findings of Fact and Conclusions of Law and Judgment implementing the Memorandum Decision were signed and entered on November 28, 1977. They are set forth in their entirety in the Appendix and were signed following the Court's denial of all of Appellant's post-trial Motions [R-44, R-47, A-5, A-11]. It is noted that at the hearing on these Motions Appellant withdrew his request for a new trial [R.48].

Appellant's appeal followed.

ARGUMENT

POINT I

THE FINDINGS AND JUDGMENT OF THE LOWER COURT ARE PRESUMED TO BE CORRECT AND WHEN THE EVIDENCE IS VIEWED IN THE LIGHT MOST FAVORABLE TO THE RESPONDENTS, AS REQUIRED ON APPEAL, IT IS CLEAR THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS AND JUDGMENT AND THAT APPELLANT HAS FAILED TO MEET HIS BURDEN OF SHOWING ERROR.

The Constitution of Utah provides in Article VIII, § 9 that on appeal from the district courts to the Supreme Court on cases at law, the appeal shall be on questions of law

alone". This case involves an action at law for money damages and in applying this constitutional provision to such cases, this Court has said that in such cases tried before the court without a jury, it will examine the evidence only so far as may be necessary to determine questions of law, and it will not pass upon the sufficiency of the evidence to justify the findings or judgment, unless there is no legitimate proof to support them and in no case will the Court determine questions of fact, *Lyman v. Town of Price*, 63 Utah 90, 222 P. 599 (1924), *Osborn v. Peters*, 69 Utah 391, 255 P. 435 (1927), *In re Alexander's Estate*, 104 Utah 286, 139 P. 2d 432 (1943) [citing numerous Utah cases], *Sine v. Salt Lake Transp. Co.*, 106 Utah 289, 147 P. 2d 875 (1944), *Jespersen v. Deseret News Publishing Co.*, 119 Utah 235, 225 P. 2d 1050 (1951). This Court has even gone so far as to state that it was powerless to substitute another evaluation of the evidence for that of the trial court where such evidence was conflicting, *Pixton v. Dunn*, 120 Utah 658, 238 P. 2d 408 (1951).

There is a presumption that the findings and judgment of the trial court were correct and on appeal they must be viewed in the light most favorable to the Respondent and every reasonable intendment and inference must be indulged in favor of them; the burden of affirmatively showing error is on the Appellant and the judgment and findings of the trial court should not be disturbed unless the evidence viewed on appeal compels a finding as a matter of law in favor of the Appellant or unless it manifestly appears that the court misapplied the law to the established facts, *R. C. Tolman Construction v. Myton Water Ass'n*, 563 P. 2d 780 (1977), *Brown v. Board of Education of Morgan County School District*, 560 P. 2d 1129 (1977), *Nyman v. Cedar City*, 12 Utah 2d 45, 361 P. 2d 1114 (1961), *Stanley v. Stanley*, 97 Utah 520, 94 P. 2d 465 (1939), *Hardy v. Hendrickson*, 27 Utah 2d 251, 495 P. 2d 28 (1972).

The trial court's findings of fact are presumed to be correct and will be disturbed only when they are shown to be in error by material, uncontroverted evidence, *C. G. Horman Co. v. Lloyd*, 28 Utah 2d 112, 499 P. 2d 124 (1972). Findings of the trial court are regarded as prima facie correct and will not be disturbed unless it is shown that they are plainly erroneous, *Burton v. Zions Cooperative Mercantile Institution*, 122 Utah 360, 249 P. 2d 514 (1952), *Jacobson v. Swan*, 3 Utah 2d 59, 278 P. 2d 294 (1954).

Respondents will now examine the evidence as it supports the Findings and Judgment.

With respect to the Judgment of October 23, 1969, it is noted that the lessee was required only to “. . . comply with the requirements of the Davis County Planning Commission with respect to terracing and will specifically see to it that there are no large caverns or holes left upon the premises”.

In this regard, the Court found in Finding Number 7 [A-7] that the “. . . letter of Fife Rock Products Company of October 7, 1971 and materials subsequently submitted in connection therewith must be deemed to have been accepted by the Davis County Planning Commission as a ‘rehabilitation plan’ ”. In Finding Number 8 [A-7] the Court found that such rehabilitation plan satisfied the standards of the Davis County Planning Commission. In Finding Number 9 [A-7] the Court found as indicated by the testimony of Steven Smith that all of the lands had been terraced so that there were no slopes greater than 1 ½ to 1 requirements of the Excavation Ordinance and the area had been planted with seed in accordance with the then prevailing custom in Davis County and that such actions fulfilled the requirements of the Rehabilitation Plan.

There is substantial evidence in the record to support these findings. The evidence shows that rehabilitation of the area was being carried out as the work progressed [T-314]; a rehabilitation plan was submitted by letter of October 7, 1971 [Pltf. Ex.-11 T-295] and a Certificate of Occupancy was approved by the Planning Director and issued by the Planning Commission [T-97]; additional material to complement the Rehabilitation Plan was later submitted [Def. Ex.-4, T-299, 300] after which time the Planning Director never requested any additional materials during the remaining time of approximately three years that he was the Planning Director [T-301, 302] and on October 4, 1973 the Planning Commission again renewed the Certificate of Occupancy without reference to any so called Rehabilitation Plan and the matter was never discussed by the Planning Commission again until long after the Lease in question had expired [T-96]. The present Director of the Planning Commission said that the actions of his predecessor were consistent with his predecessor having accepted the actions of Respondents as a fulfillment of the requirement to submit a Rehabilitation Plan [T-97, 98]; a \$10,000.00 bond was filed by Respondents with the Davis County Planning

Commission and it was renewed three times and ran to a period approximately six months after the expiration of the Lease at which time it terminated without objections from the Planning Commission and no claim or demand was ever made on the bond [T-370, 372, 373, 375, 376].

Mr. Woodland testified that he instructed an employee to take a crew to the gravel pit for three days in April, 1975 [T-309,360] and comply with the Rehabilitation Plan and remove all steep slopes and grade them to 1 ½ to 1 angles of repose and that this work was done [T-362]. He stated that he inspected the work and there was full compliance with the Rehabilitation Plan given to Mr. Sutton and the terms of the Judgment [T-313]. Mr. Smith testified that he complied with all of Mr. Woodland's instructions [T-365]. Numerous other companies other than Respondents have removed gravel from this area dating clear back into the 1930's [T-42, 43, 46, 84, 291, 303] and Appellant's own witnesses stated that they did not know how, when or by whom any of the alleged erosion had been caused [T-101, 102, 103, 198]. Appellant's witness, Guy Michael Alder, stated that he had seen a lot of erosion occur with a 1 ½ to 1 slope, which is all that is required by the Excavation Ordinance, with which Respondents complied, and that he could not dispute that the claimed erosion had occurred after the time Respondents left the area, inasmuch as he had never seen the property until a week before the trial and had only seen photographs of it taken approximately one and one-half years after the Lease expired [T-235, 246, 247]. This witness also stated that he had never seen the procedures which he described in his testimony applied to a gravel pit [T-236]; that he had no knowledge of actual customary practices used to rehabilitate gravel pits in 1967 or 1969 or at the time of trial [T-249]; that he had presented testimony with a goal for establishing a residential real estate development and not the rehabilitation of a gravel pit and that his plan exceeded the requirements of the Excavation Ordinance and included requirements not even mentioned in such Ordinance [T-250, 251] and that the description in the Lease did not cover the same area as his proposed study [T-396]. Another of Plaintiff's expert witnesses, Herbert B. Schreider, testified that he first became familiar with the property approximately one and one-half years after the Lease expired [T-171], and that he did not know when the alleged erosion

described in his testimony had occurred [T-198] and that some erosion would occur naturally [T-199] and that even that alleged in his testimony could not all be attributed to a gravel pit operation [T-199].

From these excerpts in the record and testimony it is clear that there is substantial evidence to support the findings and judgment of the trial court. Appellant may argue that the evidence is in dispute. However, this court stated in *Cannon v. Wright*, 531 P. 2d 1290 (1975):

“As we have often reiterated, it is the prerogative of the trial court to determine what aspects of the evidence he will believe [citing *Child v. Child*, 8 Utah 2d 261, 332 P. 2d, 981; *Zuniga v. Evans*, 87 Utah 198, 48 P. 2d 513]. This includes that he can be selective and choose those portions of the testimony of any witness which he thinks has the greater probability of being true.”

If the findings and judgment of the trial court are supported by any substantial evidence and reasonable inferences to be drawn therefrom, as they are in this case, such findings should not be disturbed, *Town and Country Disposal, Inc. v. Martin*, 563 P. 2d 195 (1977), *Jensen v. Eddy*, 30 Utah 2d 154, 514 P. 2d 1142, 1145 (1953).

The Findings of Fact and Conclusions of Law and Judgment in this case should remain undisturbed on appeal.

POINT II

THE TRIAL COURT'S JUDGMENT WAS NOT IN ANY WAY BASED UPON ESTOPPEL AND THE DOCTRINE OF ESTOPPEL WAS NEVER MENTIONED IN THE PLEADINGS, DURING THE COURSE OF TRIAL NOR IN THE FINDINGS OR JUDGMENT OF THE TRIAL COURT AND SUCH DOCTRINE IS TOTALLY IRRELEVANT TO ANY ISSUES PERTAINING TO THIS CASE.

Appellant has devoted a substantial portion of his Brief to a discussion of the doctrine of estoppel under his Points I, II and III. The reasons for his having done so remain obscure to the Respondents since the doctrine of estoppel was never set forth in any pleadings, was not discussed at any time during the three day trial, was not mentioned in the Courts Memorandum Decision, Findings of Fact and Conclusions of Law or Judgment, and was not ever an issue in the case at any time.

Inasmuch as the Appellant had alleged a cause of action based upon waste, which Appellant argues is an action in tort, it was necessary for the court to have some grounds upon which to determine the standard of care of nature of the duty, if any, which related to such theory. At the time the concept of estoppel was first argued by the Appellant, which was at *post-trial* Motions on November 28, 1977, the Court stated [Ruling of the Court A-13]:

“The Court rules as follows:

The Court will rule that the basic issue was not estoppel. The basic reason for reviewing the planning commission's past activity was to establish some attempt to ascertain what the standard was. That's of the day of termination of the lease.

The Court believes, taking this view, the Motion to be denied. Estoppel, in the sense as used by plaintiff's attorney was not in issue ever in the trial.”

In his Brief, Appellant has purported to tell us the basis upon which the Court arrived at its findings and judgment, claiming such basis to have been estoppel. However, the Trial Court itself specifically repudiated this view and told Appellant in open court that estoppel was not ever an issue in the trial and that the only reason for reviewing the Planning Commission's activities was for the purpose of determining what standard to apply in connection with the Appellant's allegations. The standard established by review of the Planning Commission's activities, which was only a small part of the entire evidence bearing on this subject, convinced the trial court that the Defendants had met such standard and that the Plaintiff had “no cause for action” against the Defendants.

Furthermore, Appellant has related this argument to the question of whether or not a “Rehabilitation Plan” was filed, whereas, under Paragraph 1 (g) of the Judgment of October 23, 1969 Respondents were obligated only to comply with the requirements of the Planning Commission with respect to “terracing” which the evidence referred to above shows they did by grading the land to 1 ½ to 1 angles when they left the gravel pit. The fact that the Court found that the Respondents had, in fact, submitted a “Rehabilitation Plan” and complied with it [A-7] indicates that the Respondents had gone even further than required by the Judgment of October 23, 1969 in meeting and fulfilling their responsibilities.

POINT III

THE APPELLANT HAS FAILED TO MEET HIS BURDEN OF SHOWING ANY PREJUDICIAL ERROR AND THE FINDINGS AND JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED.

A. *Date of Applicable Standards to be Applied.*

The Lease in question terminated and expired on May 18, 1975. However, in Point IV of Appellant's Brief, he seems to be arguing that Respondents did not meet their obligations under the October 23, 1969 Judgment and requirements of the Planning Commission with respect to terracing or that Respondents are somehow obligated to meet requirements established subsequent to the date of the expiration of the Lease. Appellant cites nothing from the record in support of this argument which is, in fact, directly contrary to specific findings of the Court. In Finding Number 10 [A-7] the Court found that new concepts of rehabilitation are now being developed but that they were not generally recognized or required by the parties when the Lease terminated and the rehabilitation was completed. In Finding Number 14 [A-8] the Court specifically found that "...the rehabilitation of the lands in this case was in accordance with the then prevailing standards of 1975 in the Davis County area and throughout the general area of the Wasatch front and, therefore, also in accordance with the Judgment of October 23, 1969". In that same finding the Court also stated that it did not find that there had been any violation of the law [A8].

It appears obvious that Respondents should not be required to conform to any standards which have been developed after the termination of the Lease in question. As a matter of fact, however, the evidence did not show that the Planning Commission had ever adopted any new rules or regulations after the date of the expiration of the Lease.

B. *Relationship Between Respondents*

In Point V of his Brief, Appellant attempts to make some distinction between an assignment and a sublease by referring to the obligations existing between Respondents. However, the Lease Agreement between Respondents was never received into evidence nor was there any testimony pertaining to such relationship. There is, therefore, no support in the record for Appellant's argument. In any event, during motions objecting to proposed pre-trial order which were heard on October 11, 1977 (reduced to written Order dated

October 27, 1977) [R-32], the Court refined the issues of the case by ordering [R-32] that any cause of action against Respondent Fife based upon the Judgment of October 23, 1969 would be derivative from the position of Respondent Walton. Therefore, inasmuch as the Court found in Findings Number 12 and 14 [A-7, 8] that evidence showed a compliance with said Judgment of October 23, 1969, it is totally irrelevant whether Fife was an assignee of the Lease or a sublessee. Either status would result in a "no cause for action" against Respondents.

C. Appellant's Evidence Failed to Show the Commission of Any Waste

Appellant argues that a cause of action for waste is a cause of action in tort. Respondents agree that Waste is a species of tort, 78 Am Jur 2d, Waste, § 1, however, Respondents cannot agree that violation of a statutory enactment is one of the elements of waste, although violation of statute may be considered as part of the proof. In other words, as in any tort action, a duty of care or standard of care must be established and this can be done by showing what certain statutory requirements are and/or by showing what the generally accepted standards of the community were during the time in question. In this case, Appellant has failed to make this distinction and seems to base his claim upon the argument that waste *per se* or as a matter of law has been committed by Respondents because they violated the Excavation Ordinance in question. However, the Court specifically found " . . . that there is no waste *per se* proven in this case" [Finding Number 11, A-7]; that " . . . the mining was lawfully done . . . in accordance with the then existing law . . . " [Finding Number 12, A-7]; that the acts did not support a cause of action for waste by the remainderman against a subtenant [Finding Number 13, A-8]; that the Court did not find it to have been proven that the surface of the mountain was left in violation of law and that " . . . the rehabilitation of the lands in this case was in accordance with the then prevailing standards of 1975 . . . " [Finding Number 14, A-8]; and that "the court does not find it proven by a preponderance of the evidence that the mined area has been returned to the remainderman in a wasted or negligently damaged condition" [Finding Number 16, A-8]. In so finding, the Court concluded that "Defendants have complied with the Judgment of October 23, 1969 and the Davis County

Excavation Ordinance as applied to this situation [Conclusions Number 1, A-8]. Having, therefore, found and concluded that there was no cause of action for waste based upon violation of statute or ordinance, the Court was also required to determine, and did so, whether or not there was a cause of action for waste based upon violation of any other duty or standard. In the process of arriving at a negative answer, the Court found that the mining in question was done in accordance with the then prevailing customs and usage [Finding Number 11, A-7]; “ . . . that the standards at the time the mining was done and rehabilitation completed were in accordance with the then existing law and judgment of October 23, 1969” [Finding Number 12, A-7]; that the mining was done in accordance with “ . . . the prevailing general standards of 1975 in the Davis County area and throughout the general area of the Wasatch front . . . ” [Finding Number 14, A-8]; and that the mined area was not returned to the remainderman in a wasted or negligently damaged condition [Finding Number 16, A-8]. Therefore, the Court concluded that:

“The Defendants have not done anything to constitute a nuisance, create waste, or leave the property in question in a negligently damaged condition.” [Conclusion Number 2, A-8].

Therefore, what the Court did was to find and conclude that there was no cause of action for waste based upon (1) violation of statute or ordinance, or (2) based upon any standard established by custom and usage in the area.

Appellant has misperceived the purpose for which the Court received evidence and made findings and conclusions pertaining to standards, customs, usage and practice of removing gravel in the Davis County and Wasatch front areas. This evidence was received, and subsequent findings and conclusions made, not for the purpose of showing any justification or excuse in connection with the violation of a statute or ordinance, for no such violation was found, but for the purpose of establishing whether or not there was any other standard or duty quite separate and apart from the Ordinance, which Appellant could show had been violated. Once the evidence had been received for the purpose of determining what the duty or standard was, the Court then found that Respondents had complied with such duty or standard and that there was no commission of waste based upon violation of the Ordinance or violation of any standard or duty established by custom and practice.

The Appellant has made some reference to portions of the testimony which he alleges supported his allegations of waste. Respondents have replied to these points earlier by showing that these witnesses did not see the property until a year to one and one-half years after the Lease had terminated, could not identify which erosion had occurred naturally, could not identify what erosion, if any, was attributable to the Respondents or when any of the alleged erosion had occurred. Respondents then went on to show that there was substantial evidence in the transcript and exhibits to support the findings, conclusions and judgment of the trial court. The most that can be said for the references made by Appellant, is that they show that the evidence was not completely undisputed. However, as noted in *Cannon v. Wright*, supra, the trial court can be selective in exercising his prerogative to determine what aspects of the evidence he will believe. In this case, while the evidence may not be totally undisputed, there is substantial evidence in the record to support the findings, conclusions and judgment of the trial court and, under appellate rules referred to above, they should not be disturbed on appeal.

In connection with the Excavation Ordinance in question, Respondents further note that part of the purpose of this ordinance [Pltf. Ex. -3] is declared to be that "these provisions are deemed necessary in the public interest to effect practices which will provide protection of the tax base (provide for the economical use of the vital materials necessary for our economy and give due consideration to the present and future use of land) in the interest of promoting the public health, safety and general welfare". By no stretch of the imagination can Appellant reasonably argue that under this ordinance the "economical use" of "vital materials necessary for our economy" is being promoted by allowing an owner to lease his property for the removal of gravel (for which he receives payment) and then permitting him to bring suit for damages at the expiration of the Lease.

In connection with the fact that at the time the Lease was originally made, the property was already being used for the purpose of excavating gravel, it is noted that it is a general rule that one in the possession of premises under a limited or temporary tenancy may, without being guilty of waste, continue to work mines that were open when the tenancy commenced on the theory that in such cases mining is a mere mode of use and enjoyment

and to extract minerals is merely to take the accruing profits of the land, 78 Am Jur 2d, Waste, § 24. In an analogous situation the Restatement of the Law of Property, § 144, states:

“When, prior to the creation of an estate for life, the land in which such estate is created has been used by extracting and selling coal, oil, iron, sand, clay or other like deposits found therein, or by cutting and selling timber located thereon, then the owner of such estate for life is privileged to continue the use so begun, although such continuance causes the market value of the interest limited after the estate for life to be diminished.”

In this case, it was most certainly within the contemplation of the parties when the Lease for the removal of gravel was negotiated and contracted, that there would be some significant and permanent alteration of and damage to the property and that this condition would persist and continue when and after the lease expired and the property reverted back to the fee owner. Appellant should not now be heard to complain about that which was within the contemplation of the parties at the time the Lease in question was made.

D. There was No Prejudicial Error in Receiving Any Testimony During the Trial.

In Point VII of Appellant's Brief it is claimed that the Court committed prejudicial error in receiving the testimony of Mr. Woodland with respect to a telephone conversation which he had with the then Director of the Davis County Planning Commission, Mr. Sutton, pertaining to additional materials to complete the Rehabilitation Plan. After indicating that he would send the additional materials Mr. Sutton requested, Mr. Woodland stated that Mr. Sutton said:

“In substance, he said, ‘that ought to do; that’s okay’ ”. [T-300]

Mr. Woodland then forwarded a sketch which then became a part of the official files of the Planning Commission [T-109, 110] and could have been received into evidence on that basis alone. Appellant complains that this Defendant's Exhibit Number 4 [Def. Ex.-4] was received following the conversation of which Appellant complains. However, the record clearly indicates that this Exhibit had already been received into evidence the previous day of trial during the cross-examination of one of Appellant's own witnesses. It was received without objection from the Appellant [T-109, 110].

As to the conversation itself as complained of by Appellant, it was a statement made by Mr. Sutton contemporaneous with his perceiving the event or condition which the statement narrates, described or explains, namely, the forwarding of the sketch in question and would, therefore, be admissible as a hearsay exception under the provisions of Rule 63 (4) (a) of the Utah Rules of Evidence. Furthermore, inasmuch as Mr. Sutton was charged with the duty and responsibility of administering the Excavation Ordinance as the Planning Commission Director, his statement that "that ought to do; that's okay" [meaning that the rehabilitation plan requirement had been fulfilled,] was a declaration against his interest as the Planning Commission Director and admissible as a hearsay exception under Rule 63 (10) of the Utah Rules of Evidence. In the alternative, Respondents argue that this was not a hearsay statement anyway in that it was not offered to prove the truth of the matter stated but only for the limited purpose of explaining why Mr. Woodland did what he did and what his frame of mind was in doing what he did.

Even admitting for the sake of argument that the evidence should not have been received it is clear that no prejudice resulted from its having been received. Rule 61 of the Utah Rules of Civil Procedure, "Harmless Error" states:

"No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

Rule 4, "Effect of Erroneous Admission of Evidence" of the Utah Rules of Evidence provides that:

"A verdict or finding shall not be set aside nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) There appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated *and probably had a substantial influence in bringing about a verdict or finding . . .*" [Italics Added.]

Under these standards, even if the evidence should not have been received, it is clear that its receipt was not prejudicial for the following reasons:

1. Appellant himself argues on page 28 of his Brief that “. . . whether or not a rehabilitation plan was submitted is really irrelevant in that it is not probative as to the requirements imposed upon the defendant to rehabilitate under the stipulation and judgment”.

2. There was already competent evidence received to show that a Rehabilitation Plan was submitted and approved:

- a. Mr. Moore, Mr. Sutton's successor, testified that from the evidence in the file it appeared that Mr. Sutton had accepted the letter, sketch and other materials as a Rehabilitation Plan [T-97].
- b. The letter of October 7, 1971 was received into evidence [T56, 57].
- c. A Certificate of Occupancy was issued December 3, 1971 [T-59].
- d. The Certificate of Occupancy was renewed without objection on October 4, 1973 [T-95, 96; Dec. Ex. -2].
- e. A \$10,000.00 bond was posted on November 10, 1971 following the letter of October 7, 1971 [T-91].
- f. A Rehabilitation Plan was never requested again during the term of the Lease [T-91, 96].
- g. On October 13, 1971 the County Commissioners themselves approved a Certificate of Occupancy on the gravel pit without reference to a Rehabilitation Plan [T-97, 98].
- h. No claim was ever made on the bond and it was allowed to lapse after the Lease expired without any objection from the Planning Commission [T-372, 373].

In view of the fact that there is an overwhelming amount of other competent evidence bearing upon the same matter of which Appellant complains, it is clear that if there was any error that it was “harmless error” under Rule 61 of the Utah Rules of Civil Procedure and that it did not have a “substantial influence in bringing about the verdict or finding” under Rule 4 of the Utah Rules of Evidence and that, therefore, the findings and judgment of the trial court should not be disturbed.

Appellant goes on to complain about an alleged hearsay conversation pertaining to the reasons why the Respondents did not obliterate the road in the gravel pit area. Mr. Woodland was asked why he did not instruct his crew to obliterate the road and he stated that his reasons were that he had been told that the Appellant did not want the road obliterated. The testimony was received not for the purpose of proving the truth of the matter as stated, but for the purpose of explaining his reasons for that course of action. It was not, therefore, hearsay [T-310]. Appellant again complains that Mr. Smith was allowed to testify about what someone else told him concerning Appellant's desire not to have the road obliterated. Again, this conversation did not go to the truth of the matter stated but was received for the purpose of showing the motivation of Mr. Smith as to why he did not order his crew to obliterate the road. The court said that it would:

"Permit it for that limited purpose. However, it is rejected as far as it may imply the Plaintiff actually speaking as alleged"

and

"as to why he did what he did, and the way he did it, and his frame of mind during the day of work or days of work, that you may offer it for that purpose" [T-363, 364].

In any event, the receipt of this testimony would not have been prejudicial under the rules referred to above for the reason that there was other competent evidence bearing upon this issue. Mr. Smith testified that he had a direct conversation with Appellant during which Appellant told Mr. Smith directly that he did not want the road obliterated and that he wanted that road left for access to the spring [T-366]. Furthermore, upon cross-examination, counsel for Appellant elaborated and expanded upon that conversation between Mr. Smith and Appellant [T-366, 367].

As to the objection based upon the Statute of Frauds, Respondents see no merit whatsoever to that argument and take the position that the Statute of Frauds is totally inapplicable to this case as did the trial Court [T-296, 298, 312] in overruling such objections.

For these reasons it is clear that no prejudicial error resulted from the receipt of any testimony or evidence in this case.

CONCLUSION

Appellant brought his complaint based upon two causes of action:

(1) He alleged that both Respondents were liable to him for violating the provisions of Paragraph 1 (g) of the Judgment of October 23, 1969 pertaining to the requirement to "terrace" the property at the expiration of the Lease in accordance with the requirements of the Davis County Planning Commission; and, (2) That Respondent Fife had committed waste upon the property.

After a full three-day trial, the Court found the facts in favor of both Respondents and entered a judgment for no cause for action. Upon Appeal it is presumed that these findings and the judgment are correct and the Appellant has the burden of proving to the contrary. In order to do so, it is not sufficient that the Appellant simply show that there was some dispute in the evidence. If he is to overcome the presumption in favor of the findings and judgment and meet his burden, he must show that there was no substantial evidence in the record upon which the trial court could base its findings and judgment. A review of the evidence as contained herein shows that there was substantial evidence to support the findings and judgment of the trial court and that no prejudicial error was committed during the course of the trial and for these reasons and based upon these facts the findings and judgment of the trial court should remain undisturbed on appeal and the judgment of no cause for action in favor of both Respondents should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

PAUL F. WALTON,

Plaintiff,

MEMORANDUM DECISION

vs.

Civil No. 21341

KENNETH F. WALTON, and
FIFE ROCK PRODUCTS AND
CONSTRUCTION COMPANY,

Defendants.

The Court has considered at length and deliberated on the evidence presented, the briefs submitted, and renders findings of facts and conclusions of law in a general sense below. The defense attorney is invited to submit proposed Findings of Facts and Conclusions of Law consistent with the general conclusions and outline below.

GENERAL FINDINGS

1. Paul Walton and Larene Walton were very close. Paul Walton gave the other a quit claim deed and she held his interest in trust and acted for him as trustee from the time of the making of the first deed in evidence. Even before the making of such deed, she acted for Paul Walton in a fiduciary capacity as well as for herself.
2. The original lease in question is between Mrs. Walton and Kenneth Walton. Such lease is as contained in the evidence.
3. A lawsuit was had between the parties and the court's holding as to the effecting of the lease is contained in the "Judgment" contained in the evidence. That Kenneth Walton was obligated under such lease to "terrace and comply with the planning commissions requirements upon the termination of the lease." This provision, in the general judgment, continued on the relationship that started in 1955 and that the obligation of terrace, etc.

would affect not only the diggings taking place after 1967 when the stipulation was made or 1969 when the judgment was entered, but also dates back to 1955 when the digging was first begun insofar as Kenneth Walton is concerned.

4. That the ordinance in question is contained in evidence and was enacted in approximately 1960. This ordinance was never enforced insofar as the provisions "rehabilitation of lands" were involved, but was enforced as to dust, noise and other factors. The Planning commission has never, during the period of time in question, requested the submission of a rehabilitation plan of any gravel miner, except the defendant Fife in this case, and this request was made at the plaintiff Walton's insistence. The request was for "something to be put in the file" and was not carefully examined or considered by the planning commission, and no action was taken by the planning commission within the thirty days allowed by the ordinance to disapprove such plan, and therefore the submitted "rehabilitation plan" must be deemed to have been accepted by the planning commission.

5. Fife "rehabilitation plan" did satisfy the then existing standards and was accepted by the planning commission's lack of action after the period of time required by the ordinance. Also, the Court accepts the testimony of the witness Smith as true in that when he stated that he terraced all of the lands so that there were no slopes greater than the one and one-half, and planted seed in accordance with the then prevailing custom in Davis County and like areas. That the improved and more detailed concepts of planting and rehabilitation of land are now beginning to take hold, but they were not generally recognized or required by participants before the 1955 date when this lease was terminated and the rehabilitation completed.

6. The Court finds that the mining in question was done in accordance with the then prevailing customs and usage in the mining field and that there is no waste per se proven in this case. The court finds that the mining was lawfully done and that while the area left is unpleasant in appearances and might in some future date be deemed to be a nuisance if created at a future date, that the standards at the time the mining was done and rehabilitation completed were in accordance with then existing law.

7. The Court recognizes that in a proper case, there is a possible cause of action in the
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hands of a remainder-man for waste committed by a sub-tenant. However, in this case the Court does not find the facts supporting such a cause of action.

8. The Court finds that in a proper case, a remainder-man of even an adjoining landowner might bring a successful action against a person who created unsightly scars on a mountain-side and did not rehabilitate the area so as to comply with the requirements of law, and thereby might be guilty of the creation of a nuisance which had a tendency to suppress local land values of not only the remainder-man but adjoining land users and might be declared an unlawful nuisance. Of course such a theory of action requires that the scar on the surface of the mountain be left in violation of law as the law then existed and also in violation of the prevailing general standards then in existence. The Court, however in this case, does not find that such has been proven, but does in fact find that the rehabilitation of the lands were in accordance with the then prevailing standards of 1975 in the Davis County area and throughout the general area of the Wasatch Front; and that therefore, there is no cause of action under the fact situation here present.

9. The Court finds no convincing proof that the flooding that has resulted from the digging has proceeded outside of the area in which the digging occurred to such an extent as to constitute a nuisance or menace to the lands below, unreasonably.

10. The Court does not find it proven by a preponderance of the evidence that the mined area has been returned to the remainder-man in a wasted or negligently damaged condition.

11. The Court therefore enters a "no cause for action" in favor of both Kenneth Walton and Fife Rock Products and Construction Company.

DATED this 27th day of October, 1977

JOHN F. WAHLQUIST, JUDGE

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY
STATE OF UTAH

PAUL F. WALTON,

Plaintiff,

-vs-

KENNETH F. WALTON and
FIFE ROCK PRODUCTS &
CONSTRUCTION COMPANY,
Defendants.

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

Civil No. 21341

The above entitled and numbered cause came on for Trial on Monday, Tuesday and Wednesday, October 17, 18 and 19, 1977, and the parties herein having waived a jury, said cause was tried to the Court before the Honorable John F. Wahlquist, District Judge, with Lyle J. Barnes, Esquire, appearing as attorney for Plaintiff and Felshaw King, Esquire, and William H. King, Esquire, appearing as attorneys for Defendants, and after hering the allegations and proofs of the parties, and the arguments of counsel, the Court took the matter under advisement and the Court thereupon having considered at length and deliberated on the evidence presented, the Briefs submitted, and being fully advised herein did make and enter a Memorandum Decision dated October 27, 1977 containing Findings of Fact and Conclusions of Law in a general sense and the said Memorandum Decision finding in favor of Defendants and against Plaintiff, and the Court having invited the attorneys for Defendants to submit Findings of Fact and Conclusions of Law consistent with the general conclusions of the said Memorandum Decision, the Court does hereby make the following special Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. These proceedings involved Plaintiff's Complaint for damages from Defendants based upon allegations of (1) violations of the terms of a Judgment dated October 23, 1969

in a law suit between Lerene Walton and Kenneth F. Walton and (2) as to Defendant Fife Rock Products and Construction Company, allegations of waste as defined by statute.

2. Paul Walton and Lerene Walton were very close. Paul Walton gave Lerene Walton a Quit Claim Deed to the property in question and she held his interest in trust and acted for him as trustee from the time of the making of the first Deed in evidence. Even before the making of such Deed, she acted for Paul Walton in a fiduciary capacity as well as for herself.

3. The original Lease in question was between O. F. Walton, Lerene Walton's predecessor in interest, and Kenneth F. Walton and was dated May 18, 1955. Such Lease is as contained in the evidence.

4. Lerene Walton succeeded to the interest of O. F. Walton under the Lease of May 18, 1955 and subsequently a law suit was had between Lerene Walton, Plaintiff, and Kenneth F. Walton, Defendant, in the District Court of Davis County, State of Utah, Civil Number 11601 and the parties thereto entered into a Stipulation on July 7, 1967 which was later incorporated into a Judgment dated October 23, 1969 which Judgment is as contained in the evidence. Under that Judgment and particularly Paragraph 1 (g) thereof, Kenneth F. Walton was, upon termination of said Lease, obligated to "comply with the requirements of the Davis County Planning Commission with respect to terracing" and to see to it that there were no large caverns or holes left upon premises. This provision, in the general Judgment, continued on the relationship that started in 1955 and that the obligation of terracing, etc. would affect not only the diggings taking place after 1967 when the Stipulation was made or 1969 when the Judgment was entered, but also dates back to 1955 when the digging was first begun insofar as Kenneth F. Walton is concerned.

5. That the ordinance in question pertaining to the requirements of the Davis County Planning Commission is contained in evidence and was enacted with an effective date of November 10, 1960. This ordinance was never enforced insofar as the provisions "Rehabilitation of Lands" were involved, but was enforced as to dust, noise and other factors.

6. The Davis County Planning Commission has never, during the period of time in question, requested the submission of a Rehabilitation Plan of any gravel miner except the Defendant Fife in this case, and this request was made at the Plaintiff Walton's insistence after the expiration of the Lease in question.

7. The request was made by the former director of the Davis County Planning Commission, now deceased, for "something to be put in the file" and was not carefully examined or considered by the Davis County Planning Commission, and no action was taken by the Davis County Planning Commission within the thirty (30) days allowed by the ordinance to disapprove such a plan, and therefore the submitted Rehabilitation Plan by letter of Fife Rock Products Company of October 7, 1971 and materials subsequently submitted in connection therewith must be deemed to have been accepted by the Davis County Planning Commission as a "Rehabilitation Plan".

8. The Fife "Rehabilitation Plan" referred to above did satisfy the then existing standards and was accepted by the Davis County Planning Commission's lack of action after the period of time required by the ordinance as referred to above.

9. The Court finds as indicated by the testimony of the witness Steven Smith, that Defendant Fife terraced all of the lands so that there were no slopes greater than the one and one-half to one requirements of the excavation ordinance and planted seed in accordance with the then prevailing custom in Davis County and like areas and that such actions fulfilled the requirements of the Fife "Rehabilitation Plan" referred to above.

10. That improved and more detailed concepts of planting and rehabilitation of land are now beginning to take hold, but they were not generally recognized or required by participants before the date when this Lease was terminated and the rehabilitation completed.

11. The Court finds that the mining in question was done in accordance with the then prevailing customs and useage in the mining field and that there is no waste per se proven in this case.

12. The Court finds that the mining was lawfully done and that while the area left is unpleasant in appearance and might by some future standards be deemed to be a nuisance if

created at a future date, that the standards at the time the mining was done and rehabilitation completed were in accordance with the then existing law and Judgment of October 23, 1969.

13. The Court recognizes and finds that in a proper case, there is a possible cause of action in the hands of a remainder-man for waste committed by a sub-tenant. However, in this case the Court does not find the facts supporting such a cause of action.

14. The Court recognizes and finds that in a proper case, a remainder-man of even an adjoining landowner might bring a successful action against a person who created unsightly scars on a mountain-side and did not rehabilitate the area so as to comply with the requirements of law, and thereby might be guilty of the creation of a nuisance which had a tendency to suppress local land values of not only the remainder-man but adjoining land users and might be declared an unlawful nuisance. Of course, such a theory of action requires that the scar on the surface of the mountain be left in violation of law as the law then existed and also in violation of the prevailing general standards then in existence. The Court, however, in this case does not find that such has been proven, but does in fact find that the rehabilitation of the lands in this case was in accordance with the then prevailing standards of 1975 in the Davis County area and throughout the general area of the Wasatch Front and, therefore, also in accordance with the Judgment of October 23, 1969.

15. The Court finds no convincing proof that the flooding that has resulted from the digging has proceeded outside of the area in which the digging occurred to such an extent as to constitute a nuisance or menace to the lands below, unreasonably.

16. The Court does not find it proven by a preponderance of the evidence that the mined area has been returned to the remainder-man in a wasted or negligently damaged condition.

CONCLUSIONS OF LAW

1. Defendants have complied with the Judgment of October 23, 1969 and the Davis County Excavation Ordinance as applied to this situation.

2. That Defendants have not done anything to constitute a nuisance, create waste, or leave the property in question in a negligently damaged condition.

3. The Court should, therefore, enter a Judgment for “no cause for action” in favor of both Kenneth F. Walton and Fife Rock Products and Construction Company and Plaintiff’s Complaint should be dismissed upon the merits and with prejudice with costs to Defendants.

Let Judgment be entered accordingly.

DATED this 27th day of November, 1977.

JOHN F. WAHLQUIST
District Judge

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY
STATE OF UTAH

PAUL F. WALTON,

Plaintiff,

-VS-

J U D G M E N T

KENNETH F. WALTON and
FIFE ROCK PRODUCTS &
CONSTRUCTION COMPANY,

Civil No. 21341

Defendants.

The above entitled and numbered cause came on for Trial on Monday, Tuesday and Wednesday, October 17, 18 and 19, 1977 before the Honorable John F. Wahlquist, District Judge, sitting without a Jury, with Lyle J. Barnes, Esquire, appearing as attorney for Plaintiff and Felshaw King, Esquire, and William H. King, Esquire, appearing as attorneys for Defendants, and after hearing the allegations and proofs of the parties, and the arguments of counsel, the Court took the matter under advisement and the Court thereupon having considered at length and deliberated on the evidence presented, the Briefs submitted, and being fully advised herein and having made and entered a Memorandum Decision dated October 27, 1977 and the said Memorandum Decision finding in favor of Defendants and against Plaintiff and the Court having now made and entered its formal Findings of Fact and Conclusions of Law consistent with the general conclusions of the said Memorandum Decision and having directed that Judgment be entered in accordance therewith,

Now, therefore, by reason of said law and findings,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff has no cause for action against either Defendant and that Plaintiff take nothing by his Complaint and that the same be and is hereby dismissed upon the merits with prejudice with costs to Defendants.

DATED this 27th day of November, 1977.

JOHN F. WAHLQUIST
District Judge

IN THE DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

PAUL F. WALTON,

Plaintiff,

vs.

Civil No. 21341

KENNETH F. WALTON and
FIFE ROCK PRODUCTS &
CONSTRUCTION COMPANY,

RULING OF THE COURT

Defendants.

BE IT REMEMBERED THAT this matter was heard before the Honorable John F. Wahlquist, Judge, sitting at Farmington, Utah, on the 28th day of November, 1977.

-oOo-

THE COURT: The Court rules as follows: The Court will rule that the basic issue was not estoppel. The basic reason for reviewing the planning commission's past activity was to establish some attempt to ascertain what the standard was. That's of the day of termination of the lease.

The Court believes, taking this view, the motion to be denied. Estoppel, in the sense as used by plaintiff's attorney, was not in issue ever in the trial.

Insofar as the draft submitted on the King and King stationery, I believe they are acceptable to the Court without further change. And they are a little better drafted than the Court's memorandum decision, but I believe it to be in conformity therewith.

Court denies all motions. I will sign the judgment, findings of fact as submitted by King and King, and the time for appeal begins thereon.

-oOo-

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE
RECORD OF THE RULING TO THE BEST OF MY KNOWLEDGE AND ABILITY.

DEAN C. OLSEN 11-30-77
C.S.R.