

1979

## Paul Christensen v. Weldon S. Abbott : Brief in Support of Motion for Rehearing

Utah Supreme Court

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George E. Mangan; Edward Clyde; Attorneys for Appellant;  
Wallace D. Hurd; James W. Baless; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PAUL CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
vs.	)	CASE NO. 15574
	)	
WELDON S. ABBOTT,	)	
	)	
Defendant - Respondent.	)	
	)	

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BRIEF IN SUPPORT OF  
MOTION FOR REHEARING

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GEORGE E. MANGAN of  
GEORGE E. MANGAN, A.P.C.  
P.O. Box 246  
Roosevelt, Utah 84066

EDWARD CLYDE of  
CLYDE and PRATT  
351 South State Street  
Salt Lake City, Utah 84111

Attorneys for Appellant

WALLACE D. HURD  
1011 Walker Bank Bldg.  
Salt Lake City, Utah 84111

James W. Beless  
1011 Walker Bank, Bldg.  
Salt Lake City, Utah 84111

Attorneys for Respondent

FILED

1979



MAY 31 1979

## THE SUPREME COURT OF THE STATE OF UTAH

Clerk, Supreme Court, Utah

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PAUL CHRISTENSEN,	)	
	)	
Plaintiff-Appellant,	)	PETITION FOR REHEARING
-vs-	)	
	)	
WELDON S. ABBOTT,	)	
	)	
Defendant-Respondent.	)	Civil No. 15574

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COMES NOW THE plaintiff (hereafter Christensen) pursuant to Rule 76 (e) (1), URCP, and petitions the court for a rehearing. Said petition is based upon the following points:

1. The majority decision apparently made or found "facts" that were neither claimed at the trial by the defendant (hereafter Abbott), nor found by the District Court, i.e., that the \$111,0000 promissory note was part of the "joint venture."

2. Christensen's appeal is founded in law and equity, and not merely upon the "facts" supposedly found or inferred by the trial court. Therefore, the majority opinion should not have given the trial court's conclusion any special deference.

3. The majority opinion erred in inferring facts from the conclusion reached by the trial court. This seems to especially true since the trial court did not make any finding, upon which said conclusion could logically or reasonably be based. In matters of law, the usual deference to the conclusions of law reached by the trial judge need not be indulged in, and the court should determine the error of the



4. Since the trial court would not indulge in a finding as to what the business venture between Christensen and Abbott was, then it would seem error for the majority opinion to sustain the Trial Courts conclusion of law, i.e., that the parties, by entering into the clear written agreement, intended to discharge Abbott's obligation in and to a promissory note, and to do so without even referring to the promissory note. Such a conclusion should strain all credibility and the evidence is such that reasonable men would not reasonable conclude that such was the intent of the parties.

5. Since reasonable men should not find the promissory note from Christensen to Abbott to be part of the joint venture or business relationship between the parties, then there was no valid consideration given or claimed by Abbott to secure Christensen's alleged promise to "tear it up", by reason of the Assignment and Assumption agreement.

6. The majority opinion correctly notes that from and after April 28, 1976, Abbott made no demand upon Christensen for the return of the 200 Black Angus. However, the opinion either missed or chose to ignore the greater implication of that fact - i.e., why didn't Abbott demand his cattle if the note was discharged? If Abbott truly believed that the note was to be "tore up," then why didn't he then insist upon the delivery his cattle?

7. The majority opinion erred by not requiring Abbott, as the one claiming Accord and Satisfaction, to prove the same



opinion apparently requires Christensen to disprove there was Accord and Satisfaction beyond a reasonable doubt. This net result is to place Christensen in a position contrary to all previous pronouncements of this court and to general rules of evidence, etc.

8. The majority opinion further improperly indulged in construing or implying facts, by finding that the "Assignment and Assumption Agreement" was "not intended" to be "a final and complete expression of their bargain" of Abbott and Christensen. This conclusion "flies" in the face of the preponderance of the evidence.

9. The opinion of Justice Hall is both an accurate reflection of the law and the facts and should be adopted by the majority of the court as its opinion.

10. The economic disparity and hardships created by the court imposed accord and satisfaction is both unconscionable and unjust. As a matter of equity, this court should probably remand the entire matter for a new trial with a new judge.

DATED this 31st day of May, 1979.



George E. Mangan  
Attorney for Plaintiff-Appella  
P. O. Box 246  
Roosevelt, UT 84066

#### CERTIFICATE OF MAILING

I hereby certify that on the 31st day of May, 1979, I mailed a true and correct copy of the foregoing Petition for Rehearing to Wallace D. Hurd and James W. Beless, Attorneys for Defendant, 1011 Walker Bank Building, Salt Lake City, Utah 84111.





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THE SUPREME COURT OF THE STATE OF UTAH

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PAUL CHRISTENSEN, )  
Plaintiff-Appellant, )  
-vs- ) Civil No. 15574  
WELDON S. ABBOTT, )  
Defendant-Respondent. )

---

BRIEF IN SUPPORT OF  
MOTION FOR REHEARING

---

Plaintiff, (hereafter Christensen) submits the following brief in support of his petition for a rehearing.

POINT I

PROMISSORY NOTE WAS NEVER PART OF  
JOINT VENTURE

In paragraph 2 of the majority opinion, this court made the erroneous finding that Christensen and Abbott became involved in a joint cattle ranching operation "when Abbott purchased 200 Black Angus cattle from Christensen on March 6, 1974, giving in return a non-negotiable note for \$111,000.00, payable on demand." This finding by the Supreme Court is in error for the following reasons:

A. THE TRIAL COURT MADE NO SUCH FINDING: The Trial Court

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such finding of fact when it held in its memorandum decision, "whatever the business relationship between the parties was it was terminated by the agreement of April 28, 1976."

B. ABBOTT DID NOT CLAIM NOTE AS PART OF JOINT VENTURE: The defendant Abbott never testified or claimed that the promissory note was to be part of the joint venture. All Abbott claimed was that in exchange for his executing the "Assignment and Assumption Agreement on April 26, 1976 that Christensen was to "play no more tricks" and to "tear up" the \$111,000.00 promissory note.

C. WHAT THE JOINT VENTURE INCLUDED: The only things that were included in the joint venture of the parties was the Blue Mountain property and cattle. There was no "joint" obligation to either purchase the 200 Black Angus or to pay for them. Rather there was a simple Bill of Sale by Christensen with a "home-drawn" note by Abbott, to evidence Abbott's indebtedness.

D. MAJORITY OPINION ENLARGES JOINT VENTURE: The finding of the majority opinion that the joint venture extended to and included the promissory note, enlarges the joint venture beyond even the wildest claim of Abbott.

E. DEFINITION OF JOINT VENTURE AND APPLICABLE LAW: Justice J. Thurman defined a "joint venture" in the case of Forbes v. Butler, 66 U. 373, 242 P. 950, as follows:

A joint venture is in the nature of a partnership, ordinarily, but not necessarily limited to a single transaction. The law of partnership applies as far as substantial rights are concerned. 33 C.J. 841, et seq.

Since the Forbes decision, the Utah Supreme court has always applied the law of partnership to joint venture matters. (Lane

v. Peterson, 68 U. 585, 251 P. 374; Bates v. Simpson, 121 U. 165, 239 P.2d 749; Eardly v. Samnons, 8 Utah 2d 159, 330 P.2d 122). Utah has also adopted the Uniform Partnership Act (Title 48-1-1, et seq. U.C.A., 1953 as amended), which clearly defines and sets forth the rights, duties, responsibilities, etc., of a partnership, partners, etc. In particular a partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit." (48-1-3, U.C.A.) In Koesling v. Basamaklis, 539 P.2d 1043, this court defined the subtle, but nevertheless important distinction between a joint venture and a partnership as follows:

A joint venture, in the strict legal sense, describes a single business venture or transaction, while a partnership refers to a continuing business relationship or association which extends beyond a single transaction or venture and may include innumerable transactions or ventures....(at Pg. 1045 emphasis added).

Thus while partnership law governs a joint venture, a joint venture is more limited in its scope and purposes, in that it is a single business venture.

E. BY DEFINITION ABBOTT'S NOTE COULD NOT HAVE BEEN PART OF THE "JOINT VENTURE": Either by the definition of the term "joint venture", and/or by applying partnership law, Abbott's purchase of the 200 Black Angus from Christensen with the promissory note could not have been a joint venture activity for the following reasons:

1. The purchase of the cattle and the note was not part of a "single transaction," i.e., purchase of Blue Mountain ranch and cattle;

2. Since there was no co-ownership of the 200 Angus and no joint obligation to pay for the

200 Angus, then there could be no joint venture in either the ownership or indebtedness for the cattle;

3. While the running of the 200 angus "cattle" might have been a part of the joint venture, Abbott's obligation to pay for the cattle was Abbott's sole obligation, and not a part of the joint venture.

Thus, the winding up of the joint venture or business affairs of the parties did not and could not include Abbott's obligation to pay the promissory note, and that is why the written agreement made no mention of the same.

F. ABBOTT'S CLAIM REGARDING PROMISSORY NOTE: Abbott admitted executing the promissory note; and that other than some disputed payments, the only other "payment" Abbott claimed on the note was by his assuming Christensen's obligation on the Blue Mountain Property. Abbott's further testimony was that Christensen agreed to "tear up" the note, if Abbott would just sign the agreement, but, that Abbott would not sign the agreement unless Christensen agreed not to "play any more tricks." This self serving testimony of Abbott was admitted by the Trial Court over plaintiff's timely objection that to do so violated the Parol Evidence Rule. While the trial court is entitled to certain prerogatives in making its rulings and findings, etc.; and while this appeal is a proceeding in both law and equity, the fact is, that the "findings" of the trial court should be disregarded when "it is clear that the overwhelming preponderance of the evidence is contrary" to those "findings."

Christensen would again suggest that the overwhelming preponderance of the evidence is contrary to the finding of the

trial court. In order to believe Abbott's version of the signing of the agreement of the parties, the Trial Court must have believed the representation of Abbott that Abbott insisted that Abbott would only sign if Christensen would not play any more "tricks" on Abbott. However, the overwhelming preponderance of the evidence is that there had been "no tricks" played by Christensen on Abbott at any time up to that date. However, there had been several tricks played by Abbott, i.e., no payments of any kind on a mutual obligation on the Blue Mountain Property for two years; no payment of any kind on the promissory note on the cattle for over two years; no contribution on the yearly state and BLM Lease payments for two years; and no appreciable contribution for costs of the feed, labor, etc., for maintaining the joint cattle enterprise. It was Christensen who had need to fear more tricks, not Abbott, and it was Christensen who was to have two more tricks played, on him by Abbott, plus one more by the trial court. Abbott's tricks were: 1.) that Abbott refused to pay the promissory note for the 200 Black Angus Cattle; and, 2.) then he let Christensen feed, herd, calf and care for his 200 Angus cattle for another year without paying a cent. Christensen did not promise to play no more tricks, because he had never started playing them. Also, Christensen never promised to discharge Abbott's note without payment.

Christensen pleads with this court to see that justice and equity is done, as suggested by Justice Hall. There was no Accord and Satisfaction reached between the parties, as to the

note. This court must remember, that not even Abbott claimed

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that the note was part of the joint venture.

G. THE PREPONDERANCE OF THE EVIDENCE, CONDUCT, ETC., OF ABBOTT DENIES ABBOTT'S CLAIMED DISCHARGE OF THE NOTE: The overwhelming weight of the evidence, i.e., Abbot's conduct after April 28, 1976; a reading of the Assignment and Assumption Agreement of April 28, 1976; the testimony of Mr. Draney; etc., overwhelming preponderate against Abbott's claim of discharge, and thus the court's ultimate conclusion that an Accord and Satisfaction was reached on even the promissory note.

H. NO CONSIDERATION GIVEN FOR SATISFACTION OF NOTE: Since the note was outside of the business transaction or agreement of the parties, and thus outside of the joint venture, in order for Abbott to be discharged from such a substantial obligation to Christensen, then Christensen was entitled to receive consideration for the same. While that consideration could have taken several forms, Abbott claimed that his agreement to do what he was already jointly and seperably liable to do, i.e., pay off the Blue Mountain property, was sufficient consideration. The fact is that Christensen did not escape any claims of the Haslems by entering into an agreement with Abbott. He did obtain a claim against Abbott if Abbott should fail to perform. But, if Abbott became insolvent, died, etc., Haslems' still had their original note and mortgage signed by Christensen, and Christensen was on the hook for the same. Christensen must ask, if Abbott is correct, then what new or adequate consideration did Abbott give in exchange for Christensen forgiving Abbott on the \$111,000 note plus accrued interest. What was the answer? The answer is in the

overwhelming preponderance of the evidence, i.e., there never was a discussion between Abbott and Christensen about "tearing up the note."

I. THE CONCLUSION THAT THERE WAS DISCHARGE OF THE NOTE IS ERROR, AS MATTER OF LAW: Notwithstanding the usual courtesy or deference extended to the Trial Court's Findings, Christensen urges as a matter of law, that the majority opinion errs in the Findings and Conclusion it reached. As a matter of law this court should never allow a separate, written promissory note to be terminated or paid, or satisfied, by operation of law, based on the obligees self-serving verbal agreement which is strongly in dispute. This seems especially so when there is a written contemporaneous agreement that is clear, concise, and unambiguous, which obviously does not contemplate that any other agreement is necessary, and it is itself plainly silent as to the alleged discharge.

J. MAJORITY OPINION SUBVERTS THE PURPOSE AND POLICY OF PAROL EVIDENCE RULE: The net result of the courts decision is to undermine the policy reason and purpose for which our system of jurisprudence has both adopted and followed the parol evidence rule, thereby banning the use of "inadmissible parol evidence, submitted for the purpose of varying and adding to the terms of the written agreement." See Rainford v. Rytting, 22 Utah 2d 252, 451 P.2d 769, at page 771. In the Rainford case, Justice Callister quoted from the earlier case of B.T. Moran, Inc., v. First Security Corp., 82 Utah 316, 329, 24 P.2d 384, 389 (1933)

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\* \* \* The rule is well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be conclusively presumed that the writing contained the whole of the agreement between the parties, that is a complete memorial of such agreement, and that parol evidence of contemporaneous conversations, representations, or statements will not be received for the purpose of varying or adding to the terms of the written document. (emphasis added.)

Although this court has apparently stated its continued allegiance to the principle of law set forth in the Moran case, by restating the language from that case in State Bank of Lehi v. Woolsey, Utah 565 P.2d 413 (1977), and Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266 (1972), it now appears that this court will sacrifice that principle in Christensen v. Abbott, in order to give deference to a conclusion of the trial court, even though that conclusion is apparently founded in unacceptable parol evidence. Christensen believes that this court should stand firmly by the principle of law that gave rise to the Parol Evidence rule, namely, that no person or party should be allowed, in the face of a clear and unambiguous written agreement, and/or against the preponderance of evidence, or in the absence of fraud, to establish or assert that another or an additional agreement was intended or agreed to. If the majority opinion should remain the final decision in this case, the result would seem to be to encourage the practice of deceit, fraud, and dishonesty in the name of deference to the trial court's prerogative, with a complete disregard of those principles that the parol evidence rule is designed at least in part, to

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prevent.

J. SUMMARY POINT I: As a matter of law, and in the interest of justice and equity, the majority of this court should adopt the dissenting opinion of Justice Hall, thereby reversing the decision of the Trial Court, and refusing, under the facts of the case, to give the Trial Court's Conclusion of Law, any special deference, inasmuch as the evidence overwhelmingly preponderates against the trial court's ruling. (see Ross v. Ross, 592 P.2d, 600).

#### POINT II

IT IS ERROR FOR THE SUPREME COURT  
TO "INFER" FACTS, WHEN NONE WAS  
FOUND BY THE TRIAL COURT

Counsel for Christensen recognizes the need for orderly procedure and the need to follow legal precedence. However, counsel believes and would urge, that far greater than any rule, procedure, deference or precedence that has been followed or indulged in in the past, is the need to see that justice and equity are done. While from case to case this Court may or may not give its usual "deference to the Trial Court's prerogative to adjudge the credibility of the witnesses," that deference should never be used to allow a patent injustice, fraud or an inequitable result. Consider the following:

A. NEED FOR SPECIFIC FINDINGS BY TRIAL COURT: In order for any party to intelligently appeal from a Conclusion of Law reached by a trial court, there must be a specific Findings of Fact to appeal from. This court should not give deference to the

trial court's prerogative to judge credibility of witnesses when the trial court does not itself utilize that judgment by making Findings of Fact upon which a Conclusion of Law can be based.

B. SUPREME COURT SHOULD NOT INDULGE IN SPECULATION: This court has long held that it will not "speculate on matters outside the record." (See Ream v. Fitzen, 581 P.2d 145.) By inferring what the Trial Court may have thought or found, especially when the same is not even claimed to be a fact by Abbott, then at least to that extent, the majority opinion does "speculate."

C. THE INFERENCE OF AN INCORRECT FACT IS ERROR: For the majority opinion to "infer" a fact neither found by the Trial Court, nor alleged by Abbott, which inference is in fact not a correct statement of what the agreement contained, is error and in derogation of the expressed pronouncements of this court that it will not speculate as to matters not in the record. The speculation of the majority opinion serves to compound the problem the appellant appeals from, because it leaves the appellant in the unenviable position of having to answer to facts that never existed besides coping with a sudden reversal in the settled pronouncements of this court to not engage in speculation.

D. WITHOUT SPECIFIC FINDINGS OF FACT, THERE IS NO POLICY REASON TO GIVE SPECIAL DEFERENCE TO TRIAL COURT'S PREROGATIVES: The trial court reached a Conclusion of Law, but since it did not make any Findings of Fact to review on appeal,

why is there a need for the Supreme Court to give any special

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"deference to the Trial Court's prerogative?" Also, why should such a prerogative be indulged in favor of the Trial Court, when the Trial Court, in exercising its prerogative, allowed testimony that clearly violated the parol evidence rule, in that the testimony was offered for the express purpose of abrogating or modifying the clear and unambiguous terms of a written agreement? With all due respect to deferences, precedences, procedures and rules, Christensen would urge that when there is abuse by the trial court of its discretion, by admitting parol evidence, then the prerogative of the trial judge is used or serves as a barrier to justice. This result defeats the very purpose or reason why the principle of deference to the prerogatives of the trial court was adopted, namely to serve as a shield so as to assure that justice and equity are protected.

E. SUMMARY OF POINT II: Justice and equity, demand as a matter of law, that not withstanding the normal courtesies and presumptions in favor of the prerogatives of the Trial Court, that the decision of the Trial court should be reversed, there being no Facts to justify the Conclusion of Law reached by the Trial Court.

### POINT III

#### IMPACT OF ABBOTT'S ACTIONS AND EFFECT OF EXCLUDING ABBOTT'S TESTIMONY NOT PROPERLY CONSIDERED BY THE COURT

The majority opinion correctly noted that from and after

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the 200 head of Angus cattle. If the facts were as claimed by Abbott, then surely he would have been demanding the delivery of his cattle.

Consider the following:

A. ABBOTT'S CONDUCT: Abbott's conduct after April 28, 1976 undermines his allegation that the promissory note was to be "torn up." The fair import of Abbott's silence or inaction, sustains Christenesen's allegation, and the overwhelming preponderance of the evidence, that there was no discussion contemporaneous with executing the agreement, about the promissory note.

B. EFFECT OF EXCLUDING ABBOTT'S TESTIMONY: If the Trial Court would have correctly excluded Abbott's testimony, because it was offered to vary or add to the terms of a clear and unambiguous written instrument, then the only evidence before the court, would have been: Abbott's conduct; Christensen's testimony; Dennis Draney's testimony; and, the written agreement, and that evidence, seperately and jointly, is in full harmony with each other. Furthermore, with Abbott's parol evidence excluded from the record, then there would be nothing to justify the harsh conclusion of the Trial Court, and no need to have given the trial court's conclusion any special deference. Since Christensen timely objected to the parol evidence, Christensen would urge that this court should find that the trial court abused its prerogative by allowing said testimony, and overrule the same as a matter of law.

quarrel with the use of parol evidence to explain or "show the circumstances under which the agreement was made and the purpose for which the instrument was executed." (Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266 [1972].) However, the majority opinion ignores the fact that in Christensen v. Abbott, the parol evidence offered by Abbott, far exceeded the historical exception for allowing parol evidence to be introduced. Abbott's testimony was not to explain the circumstances surrounding the execution of the agreement, as an agreement, but, as justification and or consideration for his non-payment of the promissory note! The promissory note was not a part of the joint venture of the parties. The joint venture had failed, not because Christensen had not made his contribution, but because Abbott had not. Abbott never denied that from March 1974 to April, 1976, that Christensen had contributed nearly \$100,000.00 above his initial contribution, to the joint venture, while Abbott contributed \$0. Abbott never denied that Christensen was dependant upon Abbott paying him on the \$111,000.00 note in order that he, Christensen, could make additional payments on the joint venture obligation. Abbott never denied that during the two (2) years of the joint venture, that the only payment the joint venture made of either principal or interest on the Blue Mountain mortgage, was the \$20,000 paid by Christensen. The fact is, and the overwhelming weight and preponderance of the evidence supports this position, and reasonable men would not differ with the same, but it was Abbott who caused the joint venture to fail.

True the joint venture mortgage on Blue Mountain was in

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foreclosure, and, true, both parties were liable, but since Christensen had contributed an additional \$100,000 to the joint venture and Abbott contributed \$ 0, the question that must be asked is, which party was most culpable for the financial difficulties that the joint venture was then in? Who gained the most by his failure to support the venture, and who is still being rewarded with a complete discharge from any and all obligation to repay his note? The results are neither just nor equitable.

While Abbott and Christensen reached an Accord and Satisfaction regarding the joint venture and settled that business arrangement by executing a plain, clear, and unambiguous agreement, the fact is that that is all that they did. A review of that agreement clearly indicates that there is no room in that settlement for the discharge of the promissory note. The fact is that reasonable men cannot find sufficient consideration in the settlement or agreement for the alleged "tearing up" of that promissory note. To find otherwise is unjust, unreasonable, unconscionable and unthinkable, and defies all credibility. When weighed in the balance, the net result of the majority opinion is as follows:

CONTRIBUTIONS  
(To April 28, 1976)

CHRISTENSEN

\$340,226.00

(See Appellant's Reply Brief, Pg. 19)

ABBOTT

\$100,445.00

DISTRIBUTION  
(Net Assets allowed by the trial court)

CHRISTENSEN

ABBOTT

\$69,138.00

\$376,594.00

(See Appellant's Reply Brief, Pg. 12)

WHERE IS EQUITY IN THIS KIND OF RESULT? Why should such an unfair and disproportionate distribution be upheld by the court because of deference to the trial court is error? Where is there room for "tearing up" the note in view of the facts? Why would either the trial court or the majority opinion allow Abbott to profit so disproportionately by reason of his self-serving and unsupported parol evidence about what the parties really intended when they executed the written agreement? Such a disproportionate "split" could never have "knowingly" been entered into by Christensen, and surely in order to find that he did in fact agree to "tear up" the note, then the court must find, by a preponderance of the evidence, sufficient facts to sustain Abbott's allegation that Christensen intended to do as Abbott claimed. The shocking unfairness and gross disparity in the distribution the court imposed can only mean that Christensen never intended the same.

IF all matters in dispute between the parties up to April 28, 1976, were settled along the lines found by the trial court, EXCEPT the promissory note, with interest due on the same, then we would be faced with a somewhat more just net result, i.e., as follows:

CHRISTENSEN

\$ 69,138.00  
 + 111,000.00  
 + 13,000.00  
193,138.00

Court awarded  
 + or - Note  
 + or - interest  
 Net Value

ABBOTT

\$376,594.00  
 - 111,000.00  
 - 13,000.00  
252,594.00

While the net result would still not have been even, things would have been a lot closer to being fair than what the court's opinion allows. Christensen again asserts that the above result is what the parties intended, and what the fair import of their agreement would have allowed, but for the the trial court's admission of the improper parol evidence of Abbott. Without Abbott's testimony, there would have been nothing in the record upon which this court could have given any deference, so as to allow such a unjust, harsh, cruel, and economically debacbling result to Christensen.

D. ABBOTT'S CLAIM THAT THE DISCHARGE OF NOTE WAS PART OF THE OVER ALL AGREEMENT IS NOT BELIEVABLE: Without doubt, as the trial progressed, it was evident that there was a dispute between Christensen and Abbott about whether Christensen ever agreed to discharge or "tear up" the note in exchange for signing the agreement. However, reasonable men should not find Abbott's testimony believable. Christensen testified that the matter of the note was never discussed. Abbott claimed that the note was discussed, and at the airport before he would sign it. Dennis Draney, who prepared the agreement, and who was also at the airport and witnessed Abbott sign the agreement, testified that there was "no conversation" between Abbott Christensen at the airport. When further examined by Abbott's counsel Draney

assured Abbott's counsel that if there was such a conversation,  
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that he was sure that he would have recalled the same. This court, setting as a court of equity and weighing the credibility of Abbott's self-serving and unsupported parole evidence should consider what reasonable men would have done under the circumstances. IF Abbott had truly discussed the matter of discharging the note at the airport, then a reasonable person would have done so with, or in front of, the person handling the transaction, in this case with Mr. Draney, before Abbott signed the agreement! It is most interesting to note from the record, that after Draney testified that Christensen and his son, both of whom accompanied Draney to the Roosevelt airport, had not come into the airport lounge itself where Abbot was, but had remained back by the door, from the time that Draney and Christensen entered the airport until after Abbott, who was at the desk or counter, had: 1.) reviewed the agreement; 2.) called his attorney; and 3. signed the agreement; and that following which Draney had left the airport with Christensen and his son, that Abbott chose not to refute or contradict the same. The net result of Draney's unrefuted testimony is simply that there was no time within which Abbott could have had the disputed conversation with Christensen. The overwhelming preponderance of the evidence is against the parole evidence offered by Abbott to vary the express terms of the written agreement, and to justify his non-payment of the note.

E. THE MAJORITY OPINION PERPETUATES THE ERROR OF THE TRIAL COURT BY "INFERRING" THE PROMISSORY NOTE TO BE PART OF THE BUSINESS ARRANGEMENT. As indicated in discussion above, the

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promissory note was not and could not be a part of any joint venture, or business enterprise between the parties. The conclusion reached in the trial court's decision of June 2, 1977 is:

No matter what the business arrangement was between the parties prior to April 28, 1976, on that date the parties concluded the business had failed, and they therefore, settled between them a division of the property and debts. . . (emphasis added)

The Findings of Fact prepared by Abbott's counsel add little, if anything, to the trial court's decision. Because of their brevity, the same are set forth herein, and are as follows:

1. That prior to April 28, 1976, the plaintiff and the defendant were engaged in a business enterprise.

2. That on April 28, 1976, the parties decided that the business venture had failed.

3. That on said date the parties settled and agreed between themselves to a division of the property and the debts of said business operation.

(See pgs. 1 and 2 of Findings of Fact & Conclusions of Law) (emphasis added).

It is apparent from both the initial Decision of the Trial Court, and the brief Findings that were entered, that the only thing the trial court concluded was that the business arrangement between the parties had failed, and that as a result the parties had divided the property and debts of the business. Since, the promissory note was not a part of the joint venture or business, it could not be part of the division of the property or debts of the business, and therefore was specifically excluded from the winding up agreement of the parties.

and the actual conclusions reached by the trial court, the promissory note should not have been included, by inference, presumption, or operation of law, as part of the settlement of the joint venture between the parties.

#### POINT IV

#### MAJORITY OPINION ERRED IN FINDING ACCORD AND SATISFACTION AS TO NOTE

Neither Abbott's brief nor the Majority opinion addressed itself to the issue raised in Point V of Christensen's original brief, regarding the standard of proof necessary to establish Accord and Satisfaction, to wit:

A. AS A SUBSTITUTE CONTRACT, ACCORD AND SATISFACTION MUST HAVE CLEAR ASSENT OF BOTH PARTIES: There can be little doubt of the sincerity of Christensen's testimony that he never intended to give up his right to be paid on the promissory note by signing the agreement of the parties. The overwhelming weight of the evidence, as briefly summarized in subparagraph "D" of Point III above, is that there was no discussion at the airport, or when the agreement was signed, or at any other time, about Christensen discharging Abbott from liability on the promissory note. When one weighs in balance the disparity of positions that would result from Christensen waiving his right to be paid on the promissory note, as indicated in subparagraph "C" of Point III above, then reasonable men would surely conclude that Christensen could not have consciously assented to the same. The court's attention is again drawn to the case of Tates, Inc. v. Little

stated:

The authorities dealing with this problem uniformly affirm that it must clearly appear that the parties so understood and entered into a new and substitute contract. To state the matter in the traditional contract language: that there was a meeting of the minds on such an agreement. (Emphasis added, at page 1230.)

As a matter of justice and equity, this court should find that there was no meeting of the minds; that Christensen did not understand that he was entering into a new substitute contract; and thus there was no accord and satisfaction.

B. PARTY ASSERTING ACCORD AND SATISFACTION HAS BURDEN OF PROOF: Apparently the majority opinion indirectly addressed itself to this issue by indicating that on appeal it should give deference to the trial court's findings, and not disturb those findings unless the overwhelming preponderance of the evidence was to the contrary. Christensen respectfully suggests that the overwhelming weight of the evidence is against a finding that there was any accord or satisfaction as to the promissory note. Except for the sharply disputed and unsupportable testimony of Abbott as to an alleged agreement at the airport to have "no more tricks" and to "tear up the note", Abbott introduced no other evidence to support his allegation of discharge, and his own conduct belies his claims. In the Tates, Inc. case, op.cit., Chief Justice Crockett made it amply clear that the party asserting the new agreement had the burden of proving the same. Surely that burden must be carried by a preponderance of the evidence. If the trial court had properly excluded Abbott's testimony, by reason of the parol evidence rule, then there would have been no evidence to support ~~his conclusion, but in any~~

event, reasonable men should conclude that the  
preponderance of the evidence in favor of that proposition.  
evidence presented by Abbott was in substantial conflict, and in  
such a situation, where a "novation" of the agreement or a  
meeting of the minds is required, then surely the alleged  
novation or meeting of the minds must be established by more than  
the self serving testimony of the one seeking to be discharged,  
especially when that testimony is in substantial conflict. (see  
Silva v. Holme, 109 C.A.2d 461, 241 P.2d 219 and Fairchild v.  
Mathews, 91 Idaho 1, 415 P.2d 43, and other cases cited on pages  
43 and 44 of Christensen's original brief.)

C. SUMMARY OF POINT IV: The majority opinion erred by not  
requiring Abbott to carry his burden of proving by a  
preponderance of the evidence, the alleged Accord and  
Satisfaction as to the Note. As a established and fundamental  
rule of law, one should not be able to establish a "meeting of  
the minds" or a novation by evidence that is in substantial  
conflict.

#### CONCLUSION

Christensen respectfully submits that the majority opinion's  
preoccupation with giving the usual deference to Findings and  
Conclusions of the the trial court, has perpetuated the error of:  
including the promissory note in the joint venture agreement;  
improperly inferring that the note was never claimed; and, misplacing the



burden of proof. Christensen never intended, consciously or unconsciously to discharge Abbott's obligation under the promissory note, either verbally or by signing the Agreement that terminated the joint venture of the parties. Christensen received no consideration for allegedly discharging Abbott's obligation on the note. Reasonable men should conclude that there was never a "meeting of the minds" between Christensen and Abbott for such a discharge. The opinion of Justice Hall is a correct statement of both the law and the facts, and should be adopted as the opinion of the court.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "George E. Mangan". The signature is written in a cursive, somewhat stylized script. The first name "George" is written in a larger, more prominent hand, followed by "E." and "Mangan". The signature is positioned above a horizontal line.

George E. Mangan

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Edward W. Clyde