

1988

William R. Kelley v. Leucadia Financial Corporation : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John A. Snow, Esq.; Kathryn H. Snedaker, Esq.; Van Cott, Bagley, Cornwall and McCarthy;
Attorneys for Appellant.

David R. Olsen, Esq.; Charles P. Sampson, Esq.; Paul M. Simmons, Esq.; Switter, Axland, Armstrong and Hanson; Attorneys for Respondent.

Recommended Citation

Petition for Rehearing, *Kelley v. Leucadia Financial Corporation*, No. 880534 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/1321

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50

.A10
DOCKET NO. 88-0534 IN THE UTAH COURT OF APPEALS

WILLIAM R. KELLEY, JR.,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 880534-CA
)	
LEUCADIA FINANCIAL CORPORA-)	Priority No. 14b
TION, a Delaware corporation,)	
)	
Defendant-Appellant.)	

PETITION FOR REHEARING

ON APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT FOR SUMMIT COUNTY, STATE OF UTAH
HONORABLE HOMER F. WILKINSON AND
HONORABLE PAT B. BRIAN, DISTRICT JUDGES

DAVID R. OLSEN, ESQ.
CHARLES P. SAMPSON, ESQ.
PAUL M. SIMMONS, ESQ.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101
(801) 532-7300
Attorneys for Respondent

JOHN A. SNOW, ESQ.
KATHRYN H. SNEDAKER, ESQ.
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
(801) 532-3333
Attorneys for Appellant

FILED

FEB 12 1990

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WILLIAM R. KELLEY, JR.,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 880534-CA
)	
LEUCADIA FINANCIAL CORPORA-)	Priority No. 14b
TION, a Delaware corporation,)	
)	
Defendant-Appellant.)	

PETITION FOR REHEARING

ON APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT FOR SUMMIT COUNTY, STATE OF UTAH
HONORABLE HOMER F. WILKINSON AND
HONORABLE PAT B. BRIAN, DISTRICT JUDGES

DAVID R. OLSEN, ESQ.
CHARLES P. SAMPSON, ESQ.
PAUL M. SIMMONS, ESQ.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101
(801) 532-7300
Attorneys for Respondent

JOHN A. SNOW, ESQ.
KATHRYN H. SNEDAKER, ESQ.
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
(801) 532-3333
Attorneys for Appellant

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
GROUND FOR REHEARING	4
ARGUMENT	5
POINT I KELLEY'S PETITION FOR REHEARING SHOULD BE GRANTED BECAUSE HE DID NOT HAVE AN OPPOR- TUNITY TO ADDRESS THE ISSUE UPON WHICH THE APPEAL WAS DECIDED	5
POINT II THE COURT ERRED IN RELYING ON PARAGRAPH H BECAUSE THE EVIDENCE SHOWED THAT TITLE WAS INSURABLE	8
POINT III KELLEY WAS NOT REQUIRED TO WAIVE ANY TITLE DEFECT; THUS, HIS FAILURE TO DO SO DID NOT LIMIT HIS REMEDIES	10
POINT IV THE COURT ERRED IN CONCLUDING THAT KELLEY REFUSED TO WAIVE ANY TITLE DEFECT	16
POINT V THE COURT'S CONCLUSION THAT KELLEY REFUSED TO WAIVE ANY DEFECT IS INCONSISTENT WITH KELLEY'S ELECTION OF HIS REMEDY	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES

<u>Ace Realty, Inc. v. Looney</u> , 531 P.2d 1377, 1380 (Okla. 1974)	14-15
<u>Acton v. J.B. Deliran</u> , 737 P.2d 996, 998-99 (Utah 1987) ...	6,7
<u>American Sav. & Loan Ass'n v. Blomquist</u> , 21 Utah 2d 289, 445 P.2d 1, 3 (1968)	11
<u>Bardeen v. Commander Oil Co.</u> , 48 Cal. App. 2d 355, 119 P.2d 967, 968 (1941)	6
<u>Barnes v. Woods</u> , 750 P.2d 1226, 1230 (Utah Ct. App. 1988) ..	11
<u>Beck v. Farmers Ins. Exch.</u> , 701 P.2d 795, 798 (Utah 1985) ..	13
<u>Carcione v. Clark</u> , 96 Nev. 808, 618 P.2d 346, 348 (1980) ...	15
<u>Castagno v. Church</u> , 552 P.2d 1282, 1284 (Utah 1976)	12
<u>Chavez v. Gomez</u> , 77 N.M. 341, 423 P.2d 31, 33 (1967)	17
<u>Cook v. Covey-Ballard Motor Co.</u> , 69 Utah 161, 169, 253 P. 196 (1927)	21
<u>Denton v. Sunflower Elec. Coop., Inc.</u> , 242 Kan. 430, 748 P.2d 420 (1988)	7
<u>First Security Mortgage Co. v. Armstrong</u> , Civil No. 9447	9
<u>Gonzales v. R.J. Novick Constr. Co.</u> , 20 Cal. 3d 798, 575 P.2d 1190, 1194, 144 Cal. Rptr. 408 (1978)	4
<u>Gray v. Fitzhugh</u> , 576 P.2d 88, 91 (Wyo. 1978)	9
<u>Hiltsley v. Ryder</u> , 738 P.2d 1024, 1025 (Utah 1987)	6
<u>Howard v. J.P. Paulson Co.</u> , 41 Utah 490, 495, 127 P. 284 (1912)	21
<u>John Call Eng'g, Inc. v. Manti City Corp.</u> , 743 P.2d 1205, 1207 (Utah 1987)	8

<u>Johnson v. State</u> , 240 Kan. 123, 727 P.2d 912, 916 (1986) ...	7
<u>Kimball v. Campbell</u> , 699 P.2d 714 (Utah 1985)	9
<u>Langston v. Huffacker</u> , 36 Wash. App. 779, 678 P.2d 1265, 1271 (1984)	14
<u>Leigh Furniture & Carpet Co. v. Isom</u> , 657 P.2d 293, 306 (Utah 1982)	13
<u>Reed v. Alvey</u> , 610 P.2d 1374, 1379-80 (Utah 1980)	12
<u>Romrell v. Zions First Nat'l Bank</u> , 611 P.2d 392, 395 (Utah 1980)	6, 7
<u>Rosenthal v. Sandusky</u> , 35 Colo. App. 220, 533 P.2d 523, 526 (1975)	12
<u>Salt Lake City v. Industrial Comm'n</u> , 81 Utah 213, 220-21, 17 P.2d 239, 242-43 (1932)	21
<u>State v. Stewart</u> , 729 P.2d 610, 613 (Utah 1986)	7
<u>Strand v. Associated Students of the University of Utah</u> , 561 P.2d 191, 193 (Utah 1977)	7
<u>Von Hake v. Thomas</u> , 759 P.2d 1162, 1169 n.6 (Utah 1988)	6
<u>Yates v. American Republic Corp.</u> , 163 F.2d 178, 180 (10th Cir. 1947)	17
<u>Yost Farm Co. v. Cremer</u> , 152 Mont. 200, 447 P.2d 688, 692 (1968)	16

RULES

Rule 35, Rules of the Utah Court of Appeals	1
---	---

Plaintiff-Respondent, William R. Kelley, Jr., by and through his counsel of record and pursuant to Rule 35 of the Rules of the Utah Court of Appeals, submits the following petition for rehearing.

INTRODUCTION

This request for rehearing is not an attempt to reargue matters Kelley previously briefed and argued. The court decided this appeal on a ground that Kelley never had an opportunity to address. It was not raised in the trial court. It was not raised in the docketing statement or in the appellant's briefs. Because Kelley never had an opportunity to address the issue, the court failed to consider all the relevant facts and law. Consequently, the court reached a result that is unsupported by the law and the evidence. Because the court's decision, if allowed to stand, could deprive Kelley and his family of their home of the past twenty months even though the seller has accepted their money and deeded the property to them, the court should grant Kelley's petition for rehearing and decide this appeal on a proper ground.

BACKGROUND

Kelley brought this action seeking a declaratory judgment as to the interpretation of an Earnest Money Sales Agreement (the "Agreement") and the parties' respective obligations under the Agreement and seeking specific enforcement of the Agree-

ment. The trial court denied the defendant's motion to dismiss and granted Kelly summary judgment ordering the defendant, First Security Mortgage Company,¹ to convey the subject property to Kelley. The court reserved the question of whether Kelley was entitled to an abatement of the purchase price or damages. The parties then settled the damage issue, and a final judgment was entered. First Security conveyed the property to Kelley, and Kelley and his family have occupied the property for over a year and a half.

On appeal, the parties agreed that the issue was the timeliness and sufficiency of Kelley's tender of performance. See Brief of Appellant at 1; Brief of Respondent at 2. This court, however, stated the issues as (1) whether the Agreement provided remedies to Kelley if the defendant was unable to convey marketable title and (2) whether those remedies required the defendant to convey the property if title was not marketable. Slip op. at 1. The court concluded that Kelley's only remedies under the Agreement were to waive any title defect and proceed with the closing or to terminate the Agreement and receive a refund of his earnest money deposit. Id.

¹ Appellant, Leucadia Financial Corporation, was substituted as defendant for First Security after the final judgment was entered.

The court based its decision on paragraph H of the Agreement (mistakenly referred to as paragraph 4).² Paragraph H provided as follows:

If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated.

Id.

The court concluded, first, that "[t]itle could not be made insurable without exceptions for defects," and, second, that "Kelley refused to waive the defects." Therefore, the court

² The court also looked at paragraph G of the Agreement, which stated in pertinent part:

. . . Seller shall be required, through escrow at closing, to cure the [title] defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

Record at 15. Paragraph G, unlike paragraph H, does not expressly require the buyer to waive any title defect. It merely gives the buyer the option of terminating the Agreement. As the court correctly noted, "Kelley refused to accept this option." Slip op. at 3.

held, Kelley's remedy under paragraph H "was limited to a refund of his earnest money deposit, not specific performance." Slip op. at 3. The court reversed the judgment of the trial court and remanded the case "for entry of judgment consistent with this opinion."³

GROUND FOR REHEARING

Because this court decided Leucadia's appeal on a point never raised or argued by the parties, namely, Kelley's remedies under paragraph H of the Agreement, the court should grant Kelley's petition for rehearing to allow him an opportunity to argue the law and facts relevant to that point, if for no other reason (point I).

The court should also grant Kelley a rehearing because its decision was based on wrong assumptions, namely, that paragraph H even applied because the property could not be insured (point II), that Kelley was required to waive any title defects before bringing this action (point III) and that Kelley refused to waive any defects (point IV). Kelley's filing of this lawsuit and paying his downpayment into court, far from being a refusal

³ It is unclear what the court meant by this last phrase since Leucadia did not appeal the trial court's denial of the defendant's motion to dismiss. Where only part of a lower court's decision is appealed from, appellate review is ordinarily limited to that part and does not extend to parts not appealed from. Gonzales v. R.J. Novick Constr. Co., 20 Cal. 3d 798, 575 P.2d 1190, 1194, 144 Cal. Rptr. 408 (1978).

to waive any title defects, constituted an election of remedy and showed his intent to enforce the Agreement according to its terms (point V). If the terms of the Agreement in fact required Kelley to waive any defect, then by his election he must be deemed to have waived any defects. The proper remedy would then be to deny his claim for damages or an abatement in the purchase price --not to terminate the Agreement and return his earnest money.⁴ But before Kelley gave up his right under the Agreement to receive clear title to the property, he was entitled to ask a court to determine whether First Security had complied with its obligation to clear title, whether title was in fact not curable and whether he was entitled to any abatement of the price for admitted vandalism to the property while the seller bore the risk of loss.

ARGUMENT

I.

KELLEY'S PETITION FOR REHEARING SHOULD BE GRANTED BECAUSE HE DID NOT HAVE AN OPPORTUNITY TO ADDRESS THE ISSUE UPON WHICH THE APPEAL WAS DECIDED.

Despite the parties' agreement that the only issues on appeal were the sufficiency and timeliness of Kelley's tender of performance, this court decided this case on the grounds that the Agreement precluded the relief the trial court granted Kelley. The question of the parties' contractual remedies was first raised

⁴ By not raising the issue in the trial court and by settling Kelley's damage claim, First Security has mooted that issue.

in the trial court after the partial summary judgment was entered, in the defendant's Memorandum in Support of Motion to Amend Judgment and in Support of Objection to Proposed Order. See Record at 354, 358-59 and 362-65. It was not identified as an issue on appeal in the docketing statement or in Leucadia's brief. It was first raised on appeal in Leucadia's reply brief, and the specific ground on which this court footed its decision-- paragraph H of the Agreement--was never raised in the trial court or on appeal.

Ordinarily, appellate courts will not even consider issues raised for the first time in a reply brief. Von Hake v. Thomas, 759 P.2d 1162, 1169 n.6 (Utah 1988); Romrell v. Zions First Nat'l Bank, 611 P.2d 392, 395 (Utah 1980). Although the court may, in its discretion, decide a case "upon any points that its proper disposition may require," Romrell, 611 P.2d at 395, the Utah Supreme Court has generally exercised its discretion to reverse a judgment on grounds not addressed by the parties only where the trial court failed to make findings of fact and conclusions of law as required by Utah Rule of Civil Procedure 52(a).⁵ See id.; Acton v. J.B. Deliran, 737 P.2d 996, 998-99 (Utah 1987). See also Bardeen v. Commander Oil Co., 48 Cal.

⁵ In Hiltsley v. Ryder, 738 P.2d 1024, 1025 (Utah 1987), the only other case Kelley has found in which the court reversed a judgment sua sponte on grounds not argued by the parties, the trial court's judgment was in favor of a nonparty.

App. 2d 355, 119 P.2d 967, 968 (1941), cited with approval in Romrell, 611 P.2d at 395, and Acton, 737 P.2d at 999 n.4. In such cases, the trial court's failure to make the required findings precluded effective appellate review of the issues the parties had raised on appeal. See Acton, 737 P.2d at 998-99.

Where, as here, an appellate court raises a new issue sua sponte, counsel should have a fair opportunity to brief the issue and present their positions on it to the appellate court before the issue is finally determined. Johnson v. State, 240 Kan. 123, 727 P.2d 912, 916 (1986), overruled on other grounds, Denton v. Sunflower Elec. Coop., Inc., 242 Kan. 430, 748 P.2d 420 (1988). If the court issues its decision before it has had an opportunity to consider a party's relevant arguments, it is appropriate to grant that party's request for rehearing. See State v. Stewart, 729 P.2d 610, 613 (Utah 1986) (rehearing granted where decision was issued before reply brief was filed). Moreover, the effect of remanding this case for entry of judgment would be to treat the defendant's motion to dismiss, the denial of which was not appealed, as a motion for summary judgment that was granted before the opposing side had a chance to respond. "It is error to consider a motion to dismiss as a motion for summary judgment, without giving the adverse party an opportunity to present pertinent material." Strand v. Associated Students of the University of Utah, 561 P.2d 191, 193 (Utah 1977). There-

fore, this court should grant Kelley's petition for rehearing to allow him to present facts and arguments relevant to the issue decided.

II.

THE COURT ERRED IN RELYING ON PARAGRAPH H BECAUSE THE EVIDENCE SHOWED THAT TITLE WAS INSURABLE.

This court concluded that Kelley's remedies were limited to those found in paragraph H because title to the property could not be made insurable through an escrow agreement at closing without exceptions for defects.

As Judge Bench's dissent points out, that conclusion depends on what the "property" is. The Agreement describes the "property" as "the property situated at 320 West Snows Lane" in Park City. If the "property" was simply whatever property was located at that street address as shown in First Security's deed, as Judge Bench suggests, see slip op. at 4, then there was no title defect, and paragraph H does not apply. If, however, the "property" was the property that the parties believed was covered by the Agreement, as the majority assumes, see slip op. at 2, there may have been a title defect because the neighboring land owners, the Armstrongs, also claimed an interest in a portion of the property. The majority and dissenting opinions show that the Agreement's description of the "property" was ambiguous. In interpreting a contract, the intentions of the parties are controlling. John Call Eng'g, Inc. v. Manti City Corp., 743

P.2d 1205, 1207 (Utah 1987). What the parties intended by ambiguous language is a question of fact, Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985), which would preclude entry of judgment at this stage of the proceedings, the relief ordered by this court. However, the defendant may be judicially estopped from claiming that there was no title defect.⁶

Even if the dispute over the boundary between the Armstrong and Kelley properties is considered a title defect, paragraph H may not apply. The only defects or encumbrances that would prevent title from being "insurable" under paragraph H are those not provided for in a standard form ALTA title insurance policy or not accepted under the final contract of sale. The boundary dispute with the Armstrongs comes under the standard exceptions in the preliminary commitment for title insurance that was issued in this case. Those exceptions included the following:

⁶ Under the doctrine of judicial estoppel, a party is not allowed to maintain inconsistent positions in separate judicial proceedings. Gray v. Fitzhugh, 576 P.2d 88, 91 (Wyo. 1978). In the Armstrong action, First Security took the position that it was unable to convey to Kelley marketable title to the property because of the dispute with the Armstrongs. See Amended Complaint, First Security Mortgage Co. v. Armstrong, Civil No. 9447; Record at 29-30 ¶ 17. It is therefore judicially estopped from claiming that the title was marketable.

3. Discrepancies, conflicts in boundary lines, shortages in area, encroachments, and any facts which a correct survey and inspection of the premises would disclose and which are not shown by the public records.

Deposition of Don Griffin [hereinafter Griffin Depo.], ex. 4.⁷ Leucadia never argued that paragraph H applied, and, because the standard exceptions were broad enough to cover the dispute with the Armstrongs, it clearly did not.

More importantly, however, Kelley was only required to waive defects or encumbrances under paragraph H if title could not be made insurable through an escrow agreement at closing, and the only evidence on this point was that the property was insurable. Don Griffin, the real estate agent involved in the transaction, testified that there was a title insurance company who would insure the property. Griffin Depo at 101-03.

Because title could have been insured, paragraph H did not apply and did not limit Kelley's remedies.

III.

KELLY WAS NOT REQUIRED TO WAIVE ANY TITLE DEFECT;
THUS, HIS FAILURE TO DO SO DID NOT LIMIT HIS REMEDIES.

This court concluded that Kelley's remedy was limited to a refund of his earnest money, not specific performance, because he "refused to waive" any defects. Refusal to waive a title defect could only limit Kelley's remedies if he was required

⁷ The relevant portions of Mr. Griffin's deposition are attached hereto as exhibit A.

to waive the defect. As shown above, Kelley was not required to waive any title defect under paragraph H because paragraph H did not apply.

Even if paragraph H applied or if Kelley had an implied obligation to waive any title defects before closing, Kelley was not required to waive the title defects before bringing this action, and the fact is undisputed that he ultimately did waive any defects.⁸

A waiver is an unequivocal relinquishment of a known right. American Sav. & Loan Ass'n v. Blomquist, 21 Utah 2d 289, 445 P.2d 1, 3 (1968); Barnes v. Woods, 750 P.2d 1226, 1230 (Utah Ct. App. 1988). Kelley had a right under the Agreement to clear title to the property. Record at 16 ¶ 3. Paragraphs G and H of the Agreement only applied if any title defect could not be cured through an escrow agreement at closing. There is no evidence that the alleged title defect in this case was in fact "not curable," let alone not curable through an escrow agreement at closing.⁹ The only evidence was that First Security

⁸ Kelley accepted a special warranty deed from First Security for that portion of the property to which First Security had clear title and a quitclaim deed for the rest. See also Affidavit of William R. Kelley, Record at 279 ¶ 13 ("I am willing to accept whatever title First Security has to offer").

⁹ First Security concedes that a defect in title could be cured through an escrow agreement at closing by, for example, "paying money to release liens or other encumbrances." Brief of Appellant at 13. The title defect in this case was the fact that First Security did not have clear title to all of the prop-

undertook to correct the problem and then changed its mind. After filing a lawsuit against the Armstrongs in July 1987, counsel for First Security wrote Kelley on September 4, 1987, demanding that Kelley close by September 15, 1987, with the boundary and water problems still unresolved, or take back his earnest money and walk away from the deal. The letter stated:

First Security is prepared to sell the property to you "as is" without warranty" in accordance with the terms of the earnest money agreement.¹⁰ First Security is also

erty it had contracted to sell. Under these circumstances, a seller can remedy the defect by a reduction in the purchase price equal to the value of the deficiency or defect. Reed v. Alvey, 610 P.2d 1374, 1379-80 (Utah 1980); Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976). See also Rosenthal v. Sandusky, 35 Colo. App. 220, 533 P.2d 523, 526 (1975) (buyer can agree to take less than full title for a reduced price). Thus, the parties could have cured any title defect by providing, through an escrow agreement at closing, for a reduction in the purchase price or a return to Kelley of a portion of the purchase price.

10 The evidence showed that the parties had different views as to what the terms "as is" without warranty" meant. Wayne L. Lantz, Assistant Vice-President for First Security, testified that "as is" meant that the buyer took whatever First Security had. Deposition of Wayne L. Lantz [hereinafter Lantz Depo.] at 18-21. However, both Mr. Kelley and Don Griffin, the seller's real estate agent who prepared the Agreement, testified that "as is" referred only to the condition of the property and not to title. Griffin Depo. at 93-94; deposition of William R. Kelley, Jr. [hereinafter Kelley Depo.] at 45-47. The relevant portions of Messrs. Lantz and Kelley's depositions are attached hereto as exhibits B and C respectively.

Even if First Security's interpretation of "as is" was correct, however, First Security was not entitled to insist that Kelley close without any abatement in the purchase price, as it did. See Lantz Depo. at 85. There was admitted vandalism on the property, which First Security valued at \$50,000.00. See Record at 49-51. Paragraph P of the Agreement placed the

prepared to assign you its rights in the lawsuit against the Armstrongs. Absent any obligation to the contrary or reimbursement from you for its legal costs and fees, First Security is no longer desirous of pursuing the lawsuit with the Armstrongs. First Security has not pursued the legal action against the Armstrongs as a result of any legal obligation, but simply because of its interest in closing the deal with you. First Security has never viewed itself as having the obligation to clear title, nor does the earnest money agreement provide for that obligation. Accordingly, as indicated above, First Security will sell the property in accordance with the terms of the earnest money agreement, as extended by this letter to September 15th. Otherwise, . . . First Security will return the \$10,000.00 earnest money deposited in escrow to you and pursue other alternatives.

Record at 114-15 & 292-93 (emphasis added).

Contrary to First Security's assertion, it did have an obligation to clear title, regardless of whether the Agreement expressly provided for such an obligation. First Security expressly agreed to furnish "good and marketable title to the property." Record at 16 ¶ 3. A duty of good faith and fair dealing is implied in every contract. See, e.g., Beck v. Farmers Ins. Exch., 701 P.2d 795, 798 (Utah 1985); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 306 (Utah 1982). Where a real estate contract requires the seller to convey clear title, the seller

risk of loss before closing on First Security, the seller. Record at 17. Thus, even under its own view of the Agreement First Security was not justified in insisting that Kelley close and take the property "as is" with no adjustment in the purchase price.

has an implied duty to clear the title if it can be done by the exercise of reasonable diligence. Langston v. Huffacker, 36 Wash. App. 779, 678 P.2d 1265, 1271 (1984); Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974).¹¹

In Ace Realty, Ace, the seller under a real estate contract, sought to terminate the rights of the purchaser (Tri-Angle). The contract required Ace to furnish an abstract of title and gave Ace until June 20 to meet any valid objections to the title. An examination of the abstract disclosed an unrecorded contract giving a third party (Altman) an option to purchase the property. Tri-Angle asked Ace to secure a quitclaim deed from Altman. In July Ace advised Tri-Angle that it was unable to persuade Altman to execute a quitclaim deed and attempted to return Tri-Angle's earnest money. When Tri-Angle refused to accept the earnest money, Ace filed a petition for declaratory relief, and Tri-Angle responded by seeking specific performance of the contract. Ace argued that the contract had terminated because it had not met Tri-Angle's objections to title by June 20. The court rejected the argument:

No effort was made after June 20 to secure a Quit Claim Deed from Altman, nor was the purchaser notified that he [Altman] made no claim against the property. Fair dealing required that Ace procure such a

¹¹ Don Griffin, the seller's agent, also suggested that an obligation to clear up the boundary and water problems was implied in the contract. See Griffin Depo. at 96-97.

deed if able to do so. They did not do so, but rather based their action after June 20, not on the ground of inability, but upon the contention that the purchaser had lost the right to enforce the contract.

531 P.2d at 1380. The court affirmed a grant of specific performance in favor of Tri-Angle, the purchaser.

Similarly, First Security did not base its actions in this case on its inability to clear title. Rather, First Security claimed it had no obligation to clear title and simply was "no longer desirous of pursuing the lawsuit" it had started to clear title. Record at 115.

Contrary to First Security's assertion, it did have a legal obligation to clear title if it could do so by the exercise of reasonable diligence. Kelley was only required to waive any title defect if the defect was in fact not curable through the exercise of reasonable diligence. There was no evidence that First Security could not have cured any title defect. The only evidence was that First Security was "no longer desirous" of doing so and claimed it had no obligation to clear title. First Security's lack of interest in pursuing the Armstrong lawsuit at best constituted subjective impossibility, which does not excuse a seller from conveying clear title. Carcione v. Clark, 96 Nev. 808, 618 P.2d 346, 348 (1980). Kelley was not required to accept First Security's unilateral declaration that it had no duty to clear title or its determination that it had fulfilled

whatever duty it had. Cf. Yost Farm Co. v. Cremer, 152 Mont. 200, 447 P.2d 688, 692 (1968) (buyer not required to rely completely on seller's representation concerning title defects). Before waiving any defect, Kelley was entitled to have a court declare the parties' respective rights and obligations under the Agreement and filed this action for that purpose. In filing this action, Kelley specifically asked the trial court to declare that the Agreement remained in full force and effect, that First Security was estopped from terminating Kelley's interest in the Agreement, that First Security was obligated to clear title to the property and that any breach of the contract was that of First Security. See Record at 6-7 ¶¶ 16-17. He also asked the court to enforce the Agreement. If to enforce the Agreement according to its terms meant that Kelley had to waive any title defect, he was prepared to do so and must be deemed to have done so. But it was for the court--not First Security--to say whether he was required to do so. By not raising the issue as a defense and then settling Kelley's damage claim, it was First Security --not Kelley--who waived its remedy.

IV.

THE COURT ERRED IN CONCLUDING THAT KELLEY REFUSED TO WAIVE ANY TITLE DEFECT.

This court's conclusion that Kelley refused to waive any title defect was contrary to the undisputed evidence concerning Kelley's intent.

Intention to waive a right is ordinarily a question of fact. See, e.g., Yates v. American Republic Corp., 163 F.2d 178, 180 (10th Cir. 1947); Chavez v. Gomez, 77 N.M. 341, 423 P.2d 31, 33 (1967). The only evidence of Kelley's intent was that he intended to enforce the Agreement. He did not refuse to waive any defect; he refused to waive any rights he might have under the Agreement. A refusal to waive the latter does not imply a refusal to waive the former.

Kelley consistently testified that he was willing to close at any time, even with the boundary problems, and that he communicated that willingness to Don Griffin and Vivian Cropper, the seller's agents. See Kelley Depo. at 71-86, 125-28, 134-36. The closing date had been extended three times by agreement, for a minimum of thirty days each time, to allow First Security to clear up the problems with the boundaries and water rights. During this time Kelley was repeatedly told that First Security was working out the problem and would get it taken care of. See, e.g., Kelley Depo. at 73, 88, 90; Griffin Depo. at 63, 102. He was looking for another extension agreement when he received the letter from First Security's counsel giving him seven days to close,¹² with the title issues still unresolved,

¹² Although the letter giving Kelley until September 15 to close was dated September 4, because it was sent over the Labor Day weekend, Kelley did not receive it until September 8. See Record at 288 ¶ 2.

or to "walk away from the deal." Record at 114-15, 292-93. In response to this letter Kelley sent First Security's attorney a mailgram stating, "Will not walk away. Based on history, need normal 30-day extension." Id. at 294. Kelley was still willing and able to close. See Kelley Depo. at 78, 125-28; Griffin Depo. at 120; Affidavit of William R. Kelley ¶ 13, Record at 279. He had two concerns though: He did not want to waive any legal rights he might have under the Agreement, based solely on First Security's unsupported assertion that it had no obligation under the Agreement to try to clear title or to adjust the purchase price in any way for admitted vandalism, see Lantz Depo. at 85 & 128, and he needed an opportunity to see and evaluate the documents related to the title problem.¹³ See Kelley Depo. 78, 125-28. He filed this action to preserve his rights under the Agreement. If those rights were contingent on waiving title defects, he was prepared to do so. But he wanted a court--not First Security--to say whether he was required to do so.

Presumably, this court based its conclusion that Kelley refused to waive any defects on two things: a letter from Kelley's counsel dated September 22, 1987, in which Kelley tendered to First Security the downpayment under the Agreement "conditioned only upon First Security honoring its obligations pursuant to the

¹³ First Security never provided the necessary title documents to Kelley before he filed this action, despite their promise to do so. See Record at 283.

Earnest Money Sales Agreement and delivering the property free from those defects which it has undertaken to cure," Record at 61, and on Kelley's filing of this lawsuit. Neither action was inconsistent with Kelley's election to close the transaction according to the terms of the Agreement, and thus neither action constitutes a refusal to waive any defects.

The only condition stated in the letter was that First Security honor its obligations under the Agreement and deliver the property free from the defects it had undertaken to cure. Clearly, a "condition" that one party to a contract honor its obligations under the contract merely shows an intent to enforce the contract. The parties obviously interpreted the terms of and their obligations under the Agreement differently. That is why Kelley had to file this action. But asking a court to construe the terms of an agreement and to enforce the agreement according to its terms is a far cry from refusing to waive any defect.

Similarly, for the reasons stated in part V, infra, the fact that Kelley brought an action to enforce the Agreement cannot be construed as a refusal to waive any title defects. Rather, it shows Kelley's intent to preserve his rights. If his right to enforce the Agreement was contingent on his waiving any defects, then one must infer that Kelley intended to waive those defects.

In short, evidence that Kelley insisted that First Security comply with the Agreement, that he brought an action to enforce compliance and that he accepted a special warranty deed from First Security that did not include the disputed portion of the property negates this court's conclusion that Kelley waived his right to specific performance by refusing to waive any defect.

V.

THE COURT'S CONCLUSION THAT KELLEY REFUSED TO WAIVE
ANY DEFECT IS INCONSISTENT WITH KELLEY'S ELECTION
OF HIS REMEDY.

Not only is the court's conclusion that Kelley refused to waive any defect not supported by the record, it also is contrary to the controlling law.¹⁴ Kelley had the option under either paragraph G or paragraph H to enforce the Agreement or to declare the Agreement null and void and receive a return of his earnest money. Those remedies were clearly inconsistent. Kelley could not affirm the contract and seek to enforce it while at the same time rescinding or terminating the contract and recovering his earnest money. "The former remedy counts upon the

¹⁴ It is also inconsistent with this court's conclusion that Kelley refused to accept the option of terminating the Agreement under paragraph G. See slip op. at 3; *supra* at 3 n.2. If Kelley had the option under either paragraph G or H to enforce the Agreement or to terminate it and he refused to terminate it, then he must have chosen to enforce the Agreement, which necessarily meant waiving any title defects if he was in fact required to waive them under paragraph H.

affirmance or validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. The two remedies are inconsistent, and the choice of one rejects the other, because the sale cannot be valid and void at the [same] time." Cook v. Covey-Ballard Motor Co., 69 Utah 161, 169, 253 P. 196 (1927).

Where, as here, a party has a choice between two or more inconsistent remedies, he has a duty to choose between them. And, "where the duty to elect applies, then the bringing of an action based upon one of the remedies or rights constitutes an election which is irrevocable except in case of mistake of fact or some other good and sufficient legal excuse." Howard v. J.P. Paulson Co., 41 Utah 490, 495, 127 P. 284 (1912).

By filing this action for specific performance, Kelley elected his remedy. He chose to treat the Agreement as valid and paid his downpayment into court.¹⁵ He could not thereafter terminate the contract. Cook, 69 Utah at 168; Salt Lake City v. Industrial Comm'n, 81 Utah 213, 220-21, 17 P.2d 239, 242-43 (1932) (an election of remedy is made when an action is commenced on one of two inconsistent remedies). Had Kelley later sought to terminate the Agreement and receive his earnest money back, under the authority of Cook and other Utah cases, First Security could have held Kelley to his election. If the consequence of

¹⁵ First Security eventually accepted the downpayment and deeded the property to Kelley.

Kelley's election was that he thereby waived any title defects, then the court could tailor its order of specific performance accordingly. But First Security never raised that defense, and its settlement of the issue that the trial court reserved for decision, namely, whether or not Kelley was entitled to damages for First Security's failure to convey clear title to the entire property, moots any defense First Security may have had based on paragraph H.

CONCLUSION

This court decided this appeal on an issue Kelley never had an opportunity to address. Due process and fundamental fairness require that Kelley have an opportunity to be heard before he is deprived of his property.

Moreover, the court's conclusion that Kelley was not entitled to specific performance under the Agreement was not supported by either the facts or the law. The court should therefore grant the petition for rehearing and affirm the trial court's judgment. At the very least, the court should remand this action for a trial on the merits and not for entry of judgment.

DATED this 8th day of February, 1990.

SUITTER AXLAND ARMSTRONG & HANSON

Paul M. Simmons

DAVID R. OLSEN, Esq.
CHARLES P. SAMPSON, Esq.
PAUL M. SIMMONS, Esq.
Attorneys for Respondent

SUITTER AXLAND ARMSTRONG & HANSON

DAVID R. OLSEN, Esq.
CHARLES P. SAMPSON, Esq.
PAUL M. SIMMONS, Esq.
Attorneys for Respondent
(Original signature)

CERTIFICATION

I, Paul M. Simmons, Esq., counsel for the petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Paul M. Simmons

PAUL M. SIMMONS, Esq.
Attorney for Petitioner and
Plaintiff-Respondent

PAUL M. SIMMONS, Esq.
Attorney for Petitioner and
Plaintiff-Respondent
(Original signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Petition for Rehearing were mailed, postage prepaid thereon, this 8th day of February, 1990, to:

John A. Snow, Esq.
Kathryn H. Snedaker, Esq.
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorneys for Appellant
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144

Paul M. Simmons

(Original signature)

EXHIBITS

IN THE THIRD JUDICIAL DISTRICT COURT
OF SUMMIT COUNTY, STATE OF UTAH

-000-

WILLIAM R. KELLEY, JR.,)

Plaintiff,)

vs.)

FIRST SECURITY MORTGAGE)
COMPANY, a Utah corporation)
and JOHN DOES 1- X)

Defendants.)

DEPOSITION UPON ORAL EXAMINATION OF

DON GRIFFIN

TAKEN AT: 79 South Main Street, #400
Salt Lake City, Utah

DATE: February 2, 1988

REPORTER: Catherine S. Whatley

COPY

SEELY, STACY, JONES & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS

800 Boston Building
Salt Lake City, UT 84111
328-1188

2661 Washington, #202
Ogden, Utah 84401
621-7477

EXHIBIT "A"

1 outcome." And three, "request to bank restakes on
2 the property", and that is we wanted property stakes
3 so we knew where the property was.

4 Q. Was the property ever staked?

5 A. Yes, it was staked because I have seen
6 some of the stakes.

7 Q. Is it still staked to your knowledge?

8 A. Yeah.

9 Q. Did you ever get a local attorney's
10 opinion on the probable outcome?

11 A. No, because at this point Wayne was still
12 saying that, you know, they were going -- the bank
13 was going to work it out. These were just
14 suggestions that if Kelley did go -- did want to
15 sign something that he would take the property. If
16 he did want to do that, then he would want an
17 attorney representing him telling him the probable
18 outcome of that because the bank represented -- was
19 doing all of it up until the end or still doing it
20 but we were trying to get it closed.

21 Q. And then it says, "Bank awaits call from
22 O'Keefe". Is that statement pursuant to your
23 conversation with Viv; is that what she indicated to
24 you?

25 A. I don't know. I think -- it doesn't say

1 conversation. Then I called Vic, I guess. Same day
2 7-17, I said so I must have told Vic that things are
3 changing from what we had thought for the last four
4 months.

5 Q. But your notes don't reflect that you
6 said that to Vic?

7 A. I did.

8 Q. You did, but your notes don't reflect
9 that?

10 A. That's correct. And "Vic said to set up
11 meeting with Wayne Lantz for Monday." So I called
12 Wayne to set up a meeting and discuss the bank's
13 intention.

14 And 5:00 p.m. Wayne -- no, I called Wayne
15 same day. He said the suit was filed. "I relayed
16 Craig Taylor's conversation. Wayne said that 'it
17 came down' let's close." I assume -- I don't know.
18 I assume bank people after you have things on the
19 books so long you have to get rid of them. And he
20 was told they could close and give whatever title
21 they had and what others had before them. "I then
22 read him number three of the Earnest Money regarding
23 marketable title and 'property sold as is' without
24 warranty, did not refer to title but referred to
25 number six" which has to do with the shape of the

1 property, you know, the condition of the property.

2 "Wayne said that he told them that he was
3 thinking about it", them being you and "there was no
4 change now". And that means no change in the
5 process. Right now there is no change and that the
6 bank was going to continue. "I said Vic wanted a
7 meeting to set direction and plan what to do. Wayne
8 said we could meet in one week, week of 7-27 because
9 he was off next week and nothing would change until
10 after attorneys filed and got back responses in a
11 couple of weeks or so." And at that point it is the
12 same day and I called Kelley.

13 Q. And you relayed all of that conversation
14 information to Kelley?

15 A. Sure.

16 Q. The information that I had conveyed to
17 you?

18 A. Yes, and Wayne's information.

19 Q. Do you recall what Kelley's response was
20 when you indicated to him that we wanted him to
21 share the costs if we were to continue?

22 A. Yeah, it's in the notes. "Kelley doesn't
23 want adversarial relations with Armstrongs. Kelley
24 says he had no attorney because the bank said wait
25 and they would work it out when cleared title.

1 Kelley wants to go forward. Still selling -- "means
2 selling his own properties back there" -- to meet
3 the contract conditions. Making reservations to
4 come out August first plus or minus."

5 Q. Let me ask you a couple of questions
6 about this, then let's take a break. So what was
7 your understanding of Kelley's response then
8 concerning our request that he participate in the
9 payment of the attorney's fees if we were to
10 continue on with the Armstrongs litigation?

11 A. Well, this is the first time that this
12 change and there is several changes in attitude --

13 Q. I understand.

14 A. -- came up.

15 Q. What was Kelley's response?

16 A. Well, he didn't want an adversarial
17 relationship with the Armstrongs. Everybody thinks
18 we are at the end of the tunnel all the time in this
19 deal. And he thinks it is all over and he says,
20 "Why do I want to go sue those people who are my
21 neighbors?" He didn't want an adversarial
22 relationship with people that were his neighbors.

23 Q. So his answer was he wasn't willing to
24 participate in sharing of the fees?

25 A. No. His statements were he didn't want

1 this adversarial relationship and he hadn't got an
2 attorney up to now because the bank was resolving it
3 hopefully.

4 Q. But after you spoke to me didn't you
5 understand that the bank was not interested in going
6 forward with it without some participation from him
7 in attorney's fees?

8 MR. SAMPSON: Objection. Leading.

9 A. No. No, I wasn't clear because I had
10 heard that from Wayne. You had just been in this
11 since 6-1 and I had most of my relationships with
12 Wayne and he is the one that told me -- and he had
13 had another attorney before Kevin Glade that I had
14 some conversations with, but mostly the
15 communication came through Wayne because up to this
16 time that was the first time that the bank and
17 Kelley had a different view on something. Up until
18 then everybody was just resolving the issue and we
19 were going to sell the deal and it was done.

20 Q. But there was no written agreement on the
21 boundary and water problems, was there?

22 A. Except things implied in the contract
23 that you have title and you are going to sell it
24 with title and you are going to give the guy title
25 insurance. That was all the deals I ever did is you

1 have title insurance and the guy gets the property
2 and he gets the water and he gets what he gets.
3 This is seven and a half acres at the mouth of the
4 canyon. This is one reason I wanted to survey all
5 that stuff. It's not like a condominium.

6 Q. So you recommended to Kelley that you did
7 want the survey or that he should get a survey?

8 A. Sure.

9 Q. And he agreed with your recommendation?

10 A. Sure, and the bank resisted that for two
11 or three counteroffers verbal. I think it was for
12 cost, though, like it cost \$400 or something.

13 Q. On page 13 it says, "Craig - our position
14 is to go and clear up but costs should be shared
15 with Kelley." So did you relay that information to
16 Kelley then?

17 A. Sure. I relayed that and I also relayed
18 the next conversation on the same day with Wayne
19 which says nothing has changed, nothing will change
20 for a couple of weeks until we get something back.
21 I am thinking about it. I am real clear about that
22 time in this transaction. I am real clear how your
23 statement was a real change.

24 Q. Did you also convey to Mr. Kelley Wayne
25 Lantz's statement that they could close and give

1 the first of August?

2 A. If he came out I did. I mean every time
3 he came out, I think except once, and he was out
4 some, I would meet with him and we would go to
5 dinner.

6 Q. 7-27 it says that you called Wayne?

7 A. Yeah, because he said the week of the
8 27th we could get together maybe. And so on 7-27,
9 called Wayne, asked for return call, didn't get
10 any.

11 7-29, call Wayne asked for a return call
12 on the 30th, didn't get it.

13 7-30, call Craig Taylor, no return call.
14 7-30, Don call Kelley talk to Susan, his secretary.

15 7-31, Kelley calls. I don't know if he
16 called or I called. "Bank is maybe settling down.
17 Why stir it up". I want to know if he wants an
18 attorney. Nothing has happened. I had no return
19 calls for those days so he said maybe he didn't need
20 an attorney. Maybe you guys are just going to take
21 care of it like you had been. 7-31, called Wayne is
22 out for the day. 7-31, Craig Taylor is out for the
23 day.

24 (Discussion off the record.)

25 A. "8-3, Wayne called me 20 days" and I drew

1 an arrow down because 20 days from 7-28 amended
2 filing for Armstrongs to respond. "No change in
3 bank's attitude of carrying through although closing
4 was discussed to close were title insurance company
5 who said they would insure."

6 Q. Was that Summit County Title?

7 A. Probably. This was probably Wayne's
8 statement to me that he had had that conversation
9 with them and they said they would insure.

10 Q. Did you relay that information to Kelley?

11 A. I am writing every phonecall down and I
12 don't see it right here.

13 Q. So you never conveyed Wayne's request or
14 discussion of a closing with the title company who
15 would insure?

16 A. I would go back in my notes and talk to
17 him. I don't have it right here, so I don't know.

18 Q. So you don't --

19 A. But there is no change in the bank's
20 attitude to carry through so I think things are
21 fine.

22 Q. So you didn't feel it necessary to convey
23 the discussion you had with Wayne concerning a
24 closing with a title insurance company who would
25 insure, yes or no?

1 A. It's not in my notes. I don't think I
2 did because the main thing to me is it's back like
3 it was they are going to carry through. See, my
4 view of that whole period is that you guys are
5 trying to carry through. You wanted to do it. He
6 wanted to do it. The worms kept getting bigger.

7 "8-10, Lantz called, time is up for
8 answer by Armstrongs, nothing yet from Armstrongs."

9 Q. Then you have a line?

10 A. This might have been a discussion with
11 Vivian or Vic. Let me see what it says.

12 Q. Where it says, "Close with guarantee,
13 bank will continue --"

14 A. "-- with resolution of issues of clear
15 title and give financing to buyer and his one
16 successor to suggest marketable title."

17 Q. You don't know. That was probably a
18 discussion then with somebody in your office but you
19 don't know?

20 A. Yeah, see Vivian and Vic kept thinking
21 well if the bank guarantees the title then we can
22 just close the deal and they will carry on. And I
23 thought that would be good for the bank because they
24 would get their money.

25 Q. What did Mr. Kelley say about that kind

1 A. Me too.

2 Q. So what was Kelley's response to your
3 indicating that First Security would pursue the
4 lawsuit if Kelley paid the fees; was he agreeable to
5 that or not?

6 A. I don't think it was -- you know, there
7 is nothing in writing hard down that this is the way
8 it is going to be, but it was getting down to the
9 nub that changes were in effect now, not just
10 contemplated.

11 Q. You obviously knew because you had spoken
12 with me.

13 A. Right.

14 Q. And you knew that I represented First
15 Security?

16 A. Right. Well, his position essentially
17 was "I want to buy it", from my notes here, "I want
18 to buy it. I really want it. I thought I had no
19 problem. If you say I have a problem, they made a
20 deal. We are ready willing and able", so that is
21 his response.

22 Q. Then it appears that -- does the
23 conversation continue down here? Could you clear up
24 what this is down at the bottom?

25 A. That is probably later that evening.

COMMITMENT FOR TITLE INSURANCE

SCHEDULE A

Commitment Number A-114

Effective date: MARCH 4, 1987 at 6:35 A.M.

Policy or policies to be issued:

Amount Premium

(A) ALTA Owner's Policy- Proposed Insured:

\$650,000.00 \$1,515.00

WILLIAM A. KELLY, JR.

(B) ALTA Loan Policy- Proposed Insured:

\$0.00 \$0.00

TOTAL

\$1,515.00

The estate or interest in the land described on page 1 of this commitment and covered herein is FEE SIMPLE and title thereon has been effectively date hereof vested in:

SEA, INCORPORATED, a Utah corporation

The land referred to in this commitment is described as follows:

SEE EXHIBIT "A" ATTACHED

**DEPOSITION
EXHIBIT**

2-2-88
Griffin No 4

Filed at: PARK CITY, UTAH
on: MARCH 13, 1987

SUMMIT COUNTY STATE COURT

by: Thomas F. Griffin
P.O. BOX 37 PARK CITY, UT 84302

SCHEDULE B-1

Requirements

The following are to be complied with:

Payment to or for the account of the grantors or mortgagors or the full consideration for the estate or interest to be insured.

Proper instrument(s) creating the estate or interest to be insured must be executed and duly filed for record, to-wit:

Warranty Deed from REH. INCORPORATED, a Utah corporation to WILLIAM F. REH. JR.,

and have redeemed a sale to Summit County for the taxes for the year 1985, in the original amount of \$4,811.26, plus interest, penalty and costs, and a subsequent delinquency for the year 1986, in the original amount of \$4,995.00, plus interest, penalty and costs. Serial No. 44-15-1.

tax and have redeemed a sale to Summit County for the taxes for the year 1985. in the original amount of \$231.38, plus interest, penalty and costs, and a subsequent delinquency for the year 1986, in the original amount of \$305.94, plus interest, penalty and costs. Serial No. 75-25-1.

Reconveyance of a Trust Deed dated February 24, 1982, executed by F. S. Prince, Jr. and Anne A. Prince, husband and wife, as Trustors, to First Security Bank of Utah, N. A., as Trustee, and First Security Bank of Utah, N. A. as Beneficiary, to secure the payment of \$3,000,000.00 and interest, recorded April 28, 1982, as Entry No. 190775, in Book M-218 at page 262-79, records of Summit County, Utah.

Said Debt of Trust secures, among other obligations, is set forth in said Debt of Trust, a Revolving Commercial Note, in the principal amount of \$2,500,000.00 and a Revolving Promissory Note in the principal amount of \$500,000.00.

Have dismissed an action pending in the District Court of the Third Judicial District in and for the County of Salt Lake State of Utah, entitled First Security Bank of Utah, N. A. vs F. S. Prince, Jr., et al., and filed as Civil No. CB6-5910 of records, for the purpose of foreclosure of the above referenced Trust Deed.

.Lis Pendens in said action was recorded in the Office of the County Recorder on July 31, 1986, as Entry No. 285395 in Sub. 734 at page 41. records of Summit County, Utah.

Conveyance of an Amended Trust Deed dated October 26, 1982. Executed by F. S. Prince, Jr. and Anne A. Prince, husband and wife, as Trustor, to First Security Bank of Utah, N. A., as Trustee, and First Security Bank of Utah, N. A. as Beneficiary, to secure the payment of \$2,700,000.00 and interest, recorded November 4, 1982, as Entry No. 1982-11, in Book 81-23 at page 622-627, records of Summit County, Utah.

1. Said Deed of Trust and Amended Deed of Trust requires, among other obligations, as set forth in said Deed of Trust and Amended Deed of

Trust, a Revolving Commercial Note in the principal amount of \$1,500,000.00, a Revolving Promissory Note in the principal amount of \$500,000.00 and an additional Revolving Commercial Note in the principal amount of \$750,000.00.

Partial Reconveyance of a Re-amended Trust Deed, including Assignment of Rents, dated January 24, 1983, executed by F. S. Prince, Jr. and Anne A. Prince, husband and wife, as Trustees, to First Security Bank of Utah, N. A. and First American Title Insurance Company, as Co-Trustees and First Security Bank of Utah, N. A., as Beneficiary, to secure, among other things, the payment and performance of indebtedness and obligations totaling \$4,025,000.00. (referenced is made to said document for full particulars), recorded February 3, 1983, as Entry No. 20367, in Book 41-144, at Pages 750-5C, records of Summit County, Utah.

For all taxes, charges and assessments levied and assessed against subject premises, which are due and payable.

NOTE: The name of William R. Kelly, Jr. has been checked against the records of Summit County, and no judgments or tax liens appear on record.

SCHEDULE B-2

Exceptions

policy or policies to be issued will contain exceptions to the following and the same are disposed of to the satisfaction of the Company:

Rights or claims of parties in possession not shown by the public records.

Easements, or claims of easements, not shown by the public records.

Discrepancies, conflicts in boundary lines, shortages in area, encroachments, and any facts which a correct survey and inspection of the premises would disclose and which are not shown by the public records.

Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured requires of record for value the estate or interest or mortgage therein covered by this Commitment.

Taxes for the year 1987, now accruing but not yet due or payable, and taxes for subsequent years. Currently assessed under Serial No. PP-25-1 for Parcel 1, and PP-25-2 for Parcel 2.

1. (AFFECTS PARCEL 1)

A sale to Summit County for the taxes for the year 1985, in the original amount of \$4,211.26, plus interest, penalty and costs. Serial No. PP-25-D.

a. Subsequent delinquencies were added to said sale as follows: Year 1986, \$4,575.00, plus interest, penalty and costs.

2. (AFFECTS PARCEL 2)

A sale to Summit County for the taxes for the year 1985, in the original amount of \$291.56, plus interest, penalty and costs. Serial No. PP-25-E.

d. Subsequent delinquencies were added to said sale as follows: Year 1986, \$308.94, plus interest, penalty and costs.

. This property is within the Snyderville Basin Sewer Improvement District and the Park City Fire Service District, and is subject to the charges and assessments thereof.

. The affect of the Park City-Snyderville Recreation District, recorded October 14, 1986, as Entry No. 259244, in Book 402, at Page 614, records of Summit County, Utah.

(AFFECTS THAT PORTION OF PARCEL NO. 1 LYING SOUTH OF THE CENTER LINE OF SECTION 2, TOWNSHIP 2 SOUTH, RANGE 4 EAST, AND ALL OF PARCEL 2) "A right-of-way for ditches or canals constructed by the authority of the United States." As reserved by the United States of America in that certain patent dated May 25, 1900, and recorded October 19, 1901, in Book 1 of Patents, at Page 330, records of Summit County, Utah.

1. (AFFECTS PARCEL NO. 2) The right, privilege and authority to construct, re-construct, operate and maintain its lines of telephons and telegraph, and rights incident thereto, over and across the following: an easement eight feet (8') in width described by a center line with four feet (4') on either side, as follows: COMMENCING South 2,630.74 feet and west 2,654.60 feet from the Northeast corner of Section 9, Township 2 South, Range 4 East, Salt Lake Base and Meridian; thence South 0°53' East 14 feet to end.

2. This is as granted to the Mountain States Telephone and Telegraph Company, by Right-of-Way Easement, dated July 21, 1971, and recorded September 1, 1971, as Entry No. 113900, in Book M-33, at Page 72, records of Summit County, Utah.

3. A right-of-way for ingress and egress, granted to Joseph F. Ringholz and Saverio M. Ringholz, husband and wife, by a Quit Claim Deed, dated January 18, 1981, and recorded February 13, 1981, as Entry No. 176371, in Book M-178, at Page 781. Said Quit Claim Deed was corrected and re-recorded March 21, 1981, as entry No. 177560, in Book M-182, at Page 769, records of Summit County, Utah. The right-of-way granted hereby is approximately 100 feet wide, the centerline of which is particularly described as follows:

1. BEGINNING at a point South 2590.30 feet and West 2861.37 feet from the Northwest corner of Section 9, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running East to the center of the County Road known as Snow's Lane.

4. Owner's Policy of title insurance committed for in this Commitment, or, shall contain, in addition to the items set forth in Schedule B-2, the following items:

The Deed of Trust, if any, required under Schedule S Section 1, Item 5.

5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

6) Any and all unpaid taxes, assessments and unredeemed tax sales.

EXHIBIT "A"

PARCEL NO. 1

beginning at a point South 2630.74 feet and West 2776.30 feet from the North-east corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4 degrees 03' East 421.40 feet; thence South 88 degrees 22' West 261.30 feet; thence South 50 degrees 52' West 278.0 feet; thence South 47 degrees 34' West 500.0 feet; thence North 28 degrees 57' East 505.0 feet to the center line of a ditch; thence North 33 degrees 10' East 76.0 feet along said ditch to an old spring; thence North 40 degrees East 81.0 feet; thence North 71 degrees East 97.0 feet; thence North 35 degrees 9' East 147.61 feet; thence North 30 degrees 35' East 40.10 feet; thence East 11.0 feet; thence North 45 degrees East 86.0 feet; thence North 37 degrees 8' East 125.0 feet; thence North 59 degrees 50 East 107.0 feet; thence South 7 degrees 05' East 23.0 feet; thence North 37 degrees 55' East 55.0 feet; thence North 34 degrees 15' East 75.0 feet; thence East 40.62 feet; thence South 37.0 feet; thence South 86 degrees 25' East 77.0 feet to the point of beginning.

PARCEL NO. 2:

beginning at a point South 2630.74 feet and West 2776.30 feet from the North-east corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4 degrees 03' East 421.40 feet; thence North 88 degrees 40' East 112.67 feet; thence North 0 degrees 53' East 364.4 feet; thence South 89 degrees 30' West 126.00 feet to the point of beginning.

TOGETHER WITH a right-of-way for ingress to and egress from Parcel No. 1 and Parcel No. 2 over a roadway, which is approximately three rods wide, the centerline of which is more particularly described as follows:

BEGINNING AT a point South 2607.61 feet and West 2953.77 feet from the North-east corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 89 degrees 36' East, 2097.06 feet more or less, to the center of the state highway.

LESS AND EXCEPTING from Parcel No. 1 and Parcel No. 2, the following:

BEGINNING AT a point South 2613.05 feet and West 2724.10 feet from the North-east corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, said point also being on a fence line and running thence South 1 degree 24' 14" West along said fence line 151.84 feet; thence North 88 degrees 35' West 102.89 feet; thence North 0 degrees 16' West 150.00 feet; thence South 88 degrees 25' East 84.575 feet; thence North 89 degrees 30' East 51.0 feet to the point of beginning.

THIRD JUDICIAL DISTRICT COURT
OF SUMMIT COUNTY
STATE OF UTAH

-O-

WILLIAM R. KELLEY, JR.,

:

Plaintiff,

:

Civil No. 9532

-v-

:

Deposition of:

FIRST SECURITY MORTGAGE
COMPANY, a Utah corporation,
and JOHN DOES I - X,

:

WAYNE L. LANTZ

:

Defendants.

-O-

Place:

SUITTER AXLAND ARMSTRONG &
HANSON
700 Clark Leaming Office Plaza
175 South West Temple
Salt Lake City, Utah 84111

Date:

January 15, 1988
9:45 a.m.

Reporter:

Ariel Mumma, CSR/RPR

-O-

SEELY, STACY, JONES & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS

800 Boston Building
Salt Lake City UT 84111
328-1188

2661 Washington, #202
Ogden, Utah 84401
621-7477

EXHIBIT "B"

1 Q. What was your counter?

2 A. We countered at the purchase price of \$750,000 cash
3 at closing, property sold "as is" "without warranty," title
4 conveyed by special warranty deed, corporate form, other
5 terms to remain the same. No survey to be provided by
6 seller -- and somebody else has -- something else written
7 under it but I can't --

8 Q. What did you mean when you said the language is to
9 be "as is"; the property is to be sold "as is"?

10 A. What's there is what you get.

11 Q. Who chose the -- thank you, Debbie -- (Pause)
12 (There was a discussion held off the record.)

13 Q. BY MR. OLSEN: Who chose the words "as is"?

14 A. It's just a standard close that we use on all of
15 our real estate transactions.

16 Q. First Security Mortgage uses in all of yours, your
17 transactions?

18 A. On real estate property.

19 Q. When you say "standard," explain that to me.

20 A. Standard. We just put it on all of our documents.

21 Q. How do you know to put it on your documents? Are
22 there instructions telling you to do that?

23 A. It's just been a practice since I started.

24 Q. Are there any written instructions telling you to
25 do that?

1 A. None that I'm aware of.

2 Q. So on all your documents you just put "as is"?

3 A. I can't speak for everybody. For myself, I do.

4 Q. And when you sell it "as is" or put "as is" in a
5 document, what do you intend that to mean?

6 A. That you're taking the property just as it is.

7 Q. Which means what?

8 A. Which means

9 MR. TAYLOR: Objection. He's already answered that
10 question.

11 MR. OLSEN: Well, I want his understanding. I
12 don't think he's answered that.

13 Q. When you say you just take the property as it is,
14 what do you mean? What do you take?

15 A. You take whatever First Security Mortgage has.

16 Q. Okay. I think I understand that, but let's break
17 it down into subparts. Let's assume that there's a house on
18 the property. How do I take that house?

19 MR. TAYLOR: I'm going to object. That's -- he's
20 asking a hypothetical question. He's asking the witness to
21 speculate.

22 MR. OLSEN: The objection is noted.

23 Q. Subject to the objection, supposing that there is a
24 house on the property, how do you expect a buyer to take
25 that house? What would be the duties between First Security

1 and the buyer, as you understand it, when you use the clause
2 "as is"?

3 MR. TAYLOR: Same objection?

4 MR. OLSEN: To move it along, I'll stipulate to
5 these questions you can have a continuing objection on the
6 speculation.

7 MR. TAYLOR: All right.

8 A. That when we close the property, whatever's there
9 is there. It's the buyer's.

10 Q. BY MR. OLSEN: So, for example, if after you close
11 the roof went bad, what would you expect your on-going
12 relationship with the buyer to be at that point?

13 A. None.

14 Q. And what if a pipe broke after you closed?

15 A. None.

16 Q. Now let's break it down to the property description
17 itself. As we discussed earlier, you were told that there
18 were -- I guess there was a home on the property of
19 approximately 12 acres that First Security had obtained from
20 Rick and Anne Prince, correct?

21 A. Correct.

22 Q. With regard to the property itself, the amount of
23 the real property, did you think that "as is" had any
24 bearing on that?

25 A. Which property? The property, the land --

1 Q. The land, the amount of the land.

2 A. Yes.

3 Q. How did you understand "as is" to affect your
4 ability to convey?

5 A. Whatever we have for a legal description.

6 Q. Now, let me make an example a little more extreme
7 than we have in our case, simply for illustrative purposes.
8 What if you had sold -- had a description for 12
9 acres and there were actually only 11 acres there? Would
10 the use of the word "as is" have any impact in that
11 situation?

12 MR. TAYLOR: Same objection. It continues. I
13 don't think the witness is obligated to answer these
14 hypothetical questions.

15 I believe they are calling for a legal conclusion
16 as well as posing facts not in evidence, and they ask the
17 witness to speculate as to facts that have -- that are not
18 relevant to this case, and I am going to instruct him not to
19 answer.

20 MR. OLSEN: I'm asking him his understanding of
21 "as is." I'm trying to understand what that is.

22 MR. TAYLOR: He -- if you have some specific
23 questions about what "as is" is, ask them, but not
24 hypothetical questions.

25 MR. OLSEN: I think I've asked pretty specific

1 A. We were going to convey him the legal description
2 that we had received in the deed in lieu of foreclosure when
3 we got the property back.

4 Q. BY MR. OLSEN: And your understanding was that that
5 did not include the no-man's land, correct?

6 A. At this point, yes.

7 Q. Okay.

8 A. We were also going to give him a trust deed and
9 note to be signed, key to the property, and -- I don't
10 recall if we were going to give him our assignment of the
11 complaint or not. I don't recall that.

12 Q. What were you going to do about the pond?

13 A. Nothing.

14 Q. Were you going to reduce the purchase price for the
15 loss of the pond?

16 A. No..

17 Q. In your judgment did that pond, the loss of that
18 pond, affect the value of the property?

19 A. It would be up to the purchaser whether they would
20 perceive it to be of value to them or not.

21 Q. Okay. I'm asking for your judgment. In your
22 judgment would the loss of that pond affect the value of the
23 property?

24 MR. TAYLOR: I'm going to object to the reference
25 to the loss of the pond. I believe the testimony's been

1 October 8th. I don't recall, you know, the exact time.

2 Q. Were there any restrictions placed upon the
3 granting of an extension?

4 A. Just told our counsel to -- if he would close by
5 the 8th and just -- it would be done. I mean give him one
6 last chance just to take the property "as is," with, you
7 know, no recourse against us in any way.

8 Q. For anything?

9 A. For anything, because of the suit that was filed.
10 Basically let the suit be dismissed.

11 Q. Did you ever offer an extension to the 29th or 30th
12 of September?

13 A. Now, after we reserved on the 22nd, we didn't
14 authorize anything after that, other than this other
15 extension --

16 Q. Was there --

17 A. -- which was not made -- it wasn't made then.

18 Q. Did you authorize an extension for discussion as to
19 whether it would be possible to get a closing and a release;
20 do you recall?

21 A. We offered an extension.

22 Q. But it was not in writing?

23 A. No. It was through my counsel.

24 Q. Who else at First Security had input into decisions
25 regarding the sale to Mr. Kelley?

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

WILLIAM R. KELLEY, JR.,)

Plaintiff,)

vs.)

FIRST SECURITY MORTGAGE)
COMPANY, a Utah corpora-)
tion, and JOHN DOES I-X,)

Defendants.)

CIVIL NO. 9532

DEPOSITION OF:
WILLIAM R. KELLEY, JR.

TAKEN: MARCH 22, 1988

REPORTED BY:
RENEE L. STACY, CSR, RPR

COPY

Deposition of WILLIAM R. KELLEY, JR., taken on
behalf of the Defendants, at 400 Deseret Building,
Salt Lake City, Utah, commencing at 9:45 a.m. on
March 22, 1988, before RENEE L. STACY, Certified
Shorthand Reporter, Registered Professional Reporter
and Notary Public in and for the State of Utah,
pursuant to Notice.

* * * *

SEELY, STACY, JONES & ASSOCIATES
800 Boston Building
Salt Lake City, UT 84111
(801) 328-1188

EXHIBIT "A"

1 A The boundaries for what?

2 Q The boundaries of the property.

3 A What property?

4 MR. OLSEN: It's been asked and answered.
5 He said that he saw the land and that's what he
6 bought and it was important. Now you're asking him
7 again are the boundaries important. Do you want the
8 same answer again? That's where we are.

9 THE WITNESS: It was important for me to
10 get what I thought I was getting. Don Griffin told
11 me what I was getting.

12 Q (By Mr. Taylor) Thank you. If you would
13 turn to page three of Exhibit 2. Just below the top
14 half of the page it has some handwritten terms in
15 there and part of those terms state that the
16 property sold, quote, as is, end quote. What was
17 your understanding of --

18 MR. OLSEN: Where are we looking?

19 THE WITNESS: Right here. "As is." What
20 is my understanding of "as is?"

21 Q (By Mr. Taylor) Yes.

22 A My understanding of "as is," for the last
23 20 years in my experience in real estate, is that it
24 regards and has only to do with personal property.
25 It has to do with, as Don said, broken windows in

1 the house, the carpet in the house and all the
2 different things in the house, and that was my
3 understanding of what "as is" means, and I totally
4 disagree with your position of "as is."

5 Q I understand that. I'm just asking you
6 what your understanding is.

7 A I'm saying my understanding is "as is" is
8 personal property.

9 Q And you asked for Mr. Griffin's opinion
10 as to what "as is" meant?

11 A We discussed "as is."

12 Q We meaning you and Mr. Griffin?

13 A Don and I. And we both agreed it was
14 personal property.

15 Q When did you have that discussion with
16 Mr. Griffin?

17 A I don't recall.

18 Q Do you recall where the discussion took
19 place?

20 A I don't recall.

21 Q Was anybody else present?

22 A Not that I know of.

23 Q After the "as is" clause that I've just
24 referred to, it says "without warranty." What was
25 your understanding of the language "without

1 warranty"?

2 A "Sold as is" -- I can't read this.
3 Something warranty. As is.

4 Q I believe it says "without warranty."

5 A "As is without warranty." Just as I
6 said, the personal property was -- you know, they
7 weren't warranting the heating system, they weren't
8 warranting the electric system, they weren't
9 warranting the dishwasher, the disposal, the
10 refrigerator. In other words, what I bought in that
11 house is what I got.

12 Q But you didn't insist that the words
13 "personal property" be inserted in there?

14 A There was no reason to. I know for a
15 fact what that means.

16 Q Did you ever ask what First Security's
17 understanding of those terms were?

18 A No. I had no reason to.

19 Q After the "without warranty" language it
20 states, "Title conveyed by special warranty deed."
21 Do you know what a special warranty deed is?

22 A No.

23 Q Have you ever had occasion to use a
24 special warranty deed in any of your real estate
25 transactions?

1 impact me, you know, how long would it take. I was
2 more concerned about time. You know, I thought that
3 it was going to be solved. I figured whatever it
4 took was going to take care of it and I was more
5 concerned about time frames, trying to plan my life,
6 trying to get my children where they were going to
7 be going as to school or not going to school or
8 what's going on.

9 I was trying to play my own personal life
10 so it was more of a time reference to me. I really
11 wasn't, again, concerned about the end of this
12 thing. I thought it was just going to get cleared
13 up and it was just a question of when.

14 Q Were you willing then to close as long as
15 these problems existed with the boundary and water
16 rights?

17 A I was willing to close at any time and I
18 put up the money to show good faith. I was willing
19 to close at any time.

20 Q Do you recall any other conversations
21 that took place about the property?

22 A No. Then I met with Lantz sometime
23 during the summer and we walked the property.

24 Q Do you recall when that was?

25 A I don't know. It was with you, David.

1 It was June or July.

2 Q If you don't recall, just --

3 A I don't recall. All I know is it was
4 warm weather.

5 Q Was anybody else present?

6 A There was the surveyor and -- there was
7 the surveyor, there was Griffin, there was Lantz,
8 myself and David. In fact, this is when David had
9 just first really got involved in the sense -- well,
10 not at first, but very shortly, so it must have been
11 maybe two, three weeks after you got involved,
12 because the first thing you said was, "Well, I'd
13 like to see the property," and then I said, "Do I
14 have to pay you for walking around this beautiful
15 piece of property?" And he said, "Yes."

16 Q This discussion then took place after the
17 lawsuit was -- was this after the lawsuit was filed?

18 MR. OLSEN: Let's go off the record.

19 (Discussion off the record.)

20 THE WITNESS: So the meeting took place
21 in early September. And it was warm. No snow.

22 Q (By Mr. Taylor) Were there any other
23 conversations that took place between you and Mr.
24 Griffin or you and Mr. Lantz prior to this time?

25 A Just basically that 99 percent of my

1 discussions that took place with Griffin were -- I
2 won't say 99. Excuse me. Eighty percent of my
3 discussions were basically extensions, were getting
4 an extension. Lantz was doing the extension,
5 extension, extension. It was all extensions. All
6 we were dealing with was extensions, and that was
7 most of the conversation, and if I get the
8 extension.

9 Then I'd call them and say, "Where's the
10 extension?" He'd say, "We sent it." You know, "It
11 was mailed out." And I'd say, "Fine." Then we went
12 on to the next month, the next 30 days or whatever.
13 So most of the conversation was extensions,
14 extensions, extensions, and, "We're working out the
15 problem, we are getting the problem solved and we'll
16 get it taken care of." I said, "Fine," and that was
17 it. It was a very -- you know, the summer was a
18 very quiet summer, really.

19 Q Mr. Kelley, Mr. Griffin's notes state,
20 "Kelley wants a letter of extension." Do you
21 disagree with that? This was under the date April
22 13th, 1987.

23 A Again, I don't know. The extensions were
24 discussed. Don had mentioned the extensions and so
25 had Vivian. And I said, "I want" -- "Yes. I want

1 that in writing."

2 Q Why did you want it in writing?

3 A I don't know. I guess I didn't trust the
4 bank.

5 Q You're an experienced real estate man.
6 Are you familiar with the need for written
7 agreements in real estate contracts, conveyances,
8 transactions of that sort?

9 A Well, I'm familiar with the fact that
10 when you make an agreement you sign something that
11 you agree to. They say it's proof of understanding,
12 I guess.

13 Q Is that why you wanted a written letter
14 of extension?

15 A Well, I wanted a written extension to
16 keep everything going -- you know, staying the same.
17 I didn't want it to lapse. But again, Don was
18 basically -- you know, like I said, everybody was
19 involved in the extensions because the bank didn't
20 want it to lapse, either, and Vivian didn't want it
21 to lapse, nor did Don. No one wanted it to lapse.

22 Q Mr. Kelley, you've previously stated that
23 you were willing to close with the boundary and
24 water problems.

25 A That's correct.

1 Q Why didn't you close?

2 A I was never asked to close until late --
3 until you sent me that letter in September. No one
4 asked me to close. They were solving the problems.
5 No one said in July let's close. No one said in
6 June let's close. No one said in August let's
7 close. They just kept sending me extensions saying
8 we're working on the problem, we're working on the
9 problem, we're working on the problem. I was never
10 asked to close.

11 Q You didn't consider the letter that I
12 sent you as a request to close?

13 A That was the first time, when I got that
14 letter from you, whenever it was. September,
15 whatever. The first time -- September 4th. That
16 was the first time anyone asked me to close.

17 MR. OLSEN: That's the date of the
18 letter.

19 THE WITNESS: Excuse me. That's the date
20 the letter was written, and I received it on the
21 8th. That was the first time anyone had said to me
22 that they wanted me to close. Up until then they
23 were working on the problem, going to get quiet
24 title, clear it up.

25 Q (By Mr. Taylor) Mr. Kelley, Mr.

1 Griffin's notes state, under date of 5-20, "Kelley
2 called me, very distressed. Number one, how could
3 he, Kelley, get a loan without clear title. Number
4 two, how could he, Kelley, pledge property without
5 clear title. Number three, how could he, Kelley,
6 sell the property without clear title. Number four,
7 what is it going to cost in time to clear title." Do
8 you disagree with --

9 A I don't disagree with any of it.

10 Q -- those questions?

11 A No.

12 Q You agree that you asked those questions?

13 A Absolutely.

14 Q But you were still very willing to close
15 then with the --

16 A Absolutely. But I needed information. I
17 was asking for information.

18 Q Regardless of the outcome of that
19 information, you were willing to close?

20 MR. OLSEN: Objection. Calls for
21 speculation.

22 THE WITNESS: Absolutely. I had no
23 problem with the closing. The problem was -- never
24 mind. I had no problem with the closing.

25 Q (By Mr. Taylor) Did you ever convey that

1 information to Mr. Griffin?

2 A I told him I wanted to close. I told him
3 I wanted to buy the property. I always told him
4 that. Never once did I say I didn't want to go
5 forward.

6 Q Did you ever convey that to Mr. Lantz?

7 A I never talked to Mr. Lantz. I conveyed
8 it to Don and Don conveyed it to Lantz. He was
9 constantly talking with Mr. Lantz.

10 MR. OLSEN: Craig, it's 12:00. Shall we
11 start back here at ten after 1:00?

12 MR. TAYLOR: That would be fine.

13 THE WITNESS: Only time I talked to Lantz
14 -- I told Lantz when I saw him at the --

15 Q (By Mr. Taylor) At the property?

16 A Right. That I wanted to go forth.

17 MR. TAYLOR: Let's go off the record
18 then.

19 (Recess.)

20 Q Mr. Kelley, before we left you indicated
21 that you were always willing to close the sale of
22 this property with or without the boundary or water
23 problems; is that correct?

24 A What I'm saying, so we understand -- I
25 understand what I'm saying. I'm not sure you

1 understand what you're hearing. What I'm saying,
2 right along I was being told that the problems were
3 being solved and that the bank was working to solve
4 the problems. Don Griffin was telling me that
5 things were going forward and so on.

6 What I'm saying is as soon as someone
7 told me that the problems were solved, then I was
8 ready to go forward and buy the property. So at any
9 time, if I had gotten a call in July or June or
10 whenever and said, Bill, you know, we've solved our
11 problems, we'd like to close next week, I would have
12 said, Fine, let's go. But basically that's -- you
13 know, that's my point. I was willing to close at
14 any time when the problems were solved that the bank
15 was dealing with and solving.

16 Q But you weren't willing to close if the
17 bank refused to resolve those problems?

18 A I was willing to close but not giving up
19 any of my rights that I might have in the court of
20 law. You know, I was willing to let the judge
21 determine what my rights were, but I was willing to
22 close, yes, but I was not going to give up my legal
23 rights.

24 (Whereupon Defendant's
25 Exhibit No. 3 was marked
for identification.)

1 Q Mr. Kelley, I'm going to give you what's
2 been marked as Deposition Exhibit No. 3 and ask you
3 to identify that document.

4 A I'd identify it as Exhibit No. 3 and it
5 says it's a hand delivered letter from Craig Taylor
6 -- no, wait a minute. To Craig Taylor. Yeah, okay.
7 To Craig Taylor from David Olsen.

8 Q Do you recognize that letter?

9 A I've seen this letter.

10 Q Did Mr. Olsen send you a copy of that
11 letter?

12 A Yes, he --

13 Q Is that how you saw the letter?

14 A Yes.

15 Q You authorized --

16 A Actually, I'm not sure about that. He
17 might have read it to me over the phone and then I
18 got it sometime later.

19 Q And you authorized him to make the
20 statements in that letter; is that correct?

21 A He's my counsel. Yes.

22 Q Does that letter accurately reflect your
23 position?

24 (Discussion between witness and his
25 attorney.)

1 A So what David is saying is that we had
2 filed a complaint at the same time as this letter.

3 Q That's what Mr. Olsen told you?

4 A Right.

5 (Discussion off the record.)

6 Q Would you mind reading into the record
7 the portion that you just underlined?

8 A "This tender is conditioned only upon
9 First Security honoring its obligation pursuant to
10 the Earnest Money Sales Agreement and delivering the
11 property free from those defects which it has
12 undertaken to cure."

13 Q Does that statement accurately reflect
14 your position at the time this letter was delivered?

15 A I don't believe so, in the sense that I
16 don't believe that -- again, I have not talked to
17 David about this, but I don't believe there would be
18 a condition. I wanted to purchase the property
19 subject to them removing the defects and giving --
20 if they didn't remove them, to give me time to find
21 out what they were.

22 Q So this letter then does not reflect your
23 position?

24 A Well, it does reflect my position except
25 that I have some reservations about this one

1 statement here.

2 Q And what are those reservations?

3 A That I believe that -- it says here,
4 "This tender is conditioned only upon First Security
5 honoring its obligations pursuant to the Earnest
6 Money Sales Agreement and delivering the property
7 free from those defects which it has undertaken to
8 cure." It's conditioned only upon -- I'm not sure
9 that I had any conditions with that regard.

10 Basically I'm saying that I was willing
11 to purchase the property. I thought First Security
12 was going to clear up all the problems. If they
13 didn't clear up the problems, I needed time to
14 evaluate these problems and was still going to go
15 forward, and then whatever remedies I had available
16 to me legally I would have pursued.

17 Q So it was your intent that a tender was
18 to be unconditionally made to First Security?

19 A No. The tender would have been that I
20 not lose any of my legal rights and so on.

21 Q Did you ever tell somebody to take the
22 closing money and give it to First Security?

23 A I said that the money was available to
24 First Security and that's when I tendered it, to
25 show good faith, and that I would, you know, give

1 the money to First Security when we passed papers on
2 the house.

3 Q This letter states that the money was
4 placed in an account at Williamsburg Savings Bank;
5 is that correct?

6 A Yes.

7 Q That statement is accurate?

8 A I believe so. I don't -- you know, I
9 finally -- at the time I didn't know that -- I mean,
10 I was told or asked to send out monies to show good
11 faith and that I wanted to go forward.

12 Q Who asked you to send that money out?

13 A David.

14 Q Meaning Mr. Olsen?

15 A Mr. Olsen. And that I wanted to show
16 good faith. I told them that I wanted to buy the
17 property and if the bank was concerned -- it was
18 also my suggestion as well that I wanted to show
19 good faith with the bank and let the bank know -- I
20 mean, I could see where the bank might get a little
21 concerned with having only \$10,000 deposited on this
22 kind of a piece of property so I wanted to send more
23 money out to make them aware of the fact that I
24 wanted to go forward and was ready and willing to go
25 forward.

1 Q And you considered that placing that
2 money in Williamsburg Savings Bank was a sufficient
3 tender?

4 A Well, I don't know if it was tender, but
5 it was sufficient for the bank to know my intentions
6 and that I was showing the bank good will, that I
7 had the money, wanted to go forward and here was the
8 money available and I was willing to pass on the
9 property.

10 Q Gump & Ayers was the escrow in this deal;
11 is that correct?

12 A Yes, but I'm not sure that -- when was
13 the 10,000 returned or something like that?

14 MR. OLSEN: It wasn't.

15 MR. TAYLOR: Just answer the question.

16 THE WITNESS: Okay. Originally, yes.

17 Q (By Mr. Taylor) Originally Gump & Ayers
18 was the escrow?

19 A Yes. For the \$10,000, yes.

20 Q Why didn't you send the additional
21 closing money to Gump & Ayers and have it placed in
22 escrow?

23 A Because I believe in my discussions with
24 Mr. Olsen --

25 MR. OLSEN: You don't need to discuss and

1 don't discuss what we talked about.

2 MR. TAYLOR: You don't need to tell me
3 what your discussions were with Mr. Olsen.

4 THE WITNESS: I guess I just came to the
5 conclusion that as long as it was in the State of
6 Utah and in the bank in Utah and was available to be
7 used for the down payment as we agreed that that
8 would be fine and dandy.

9 Q (By Mr. Taylor) Mr. Kelley, are there
10 any other statements within this letter marked
11 Exhibit 3 with which you disagree?

12 A I didn't say that I disagreed. I said
13 I'm not sure that I would state this as it is stated
14 here, okay. I'm saying that as far as tendering on
15 a condition, I was saying basically that I wanted to
16 go forward. If the bank solved the problems, I
17 wanted to go forward.

18 If the bank came to me, as they did later
19 on, and said, you know, if you don't go forward the
20 deal is dead, then I said, well, hey, you know, I
21 still want to buy the property. I need more time.
22 I need some information to find out all the problems
23 that you were trying to solve that hadn't been
24 solved. I needed to find out what they were so I
25 could have enough information. But anyway --

1 Q Excuse me. Before you continue on, to
2 whom did you state this position? I'd like to know
3 everybody to whom you stated that position.

4 MR. OLSEN: Other than counsel?

5 MR. TAYLOR: Exactly.

6 THE WITNESS: I've been stating that
7 position right along.

8 Q (By Mr. Taylor) I understand that.

9 A To Don Griffin.

10 Q Do you recall --

11 A To Vivian. In fact, I saw Vivian at a
12 dance or something and I stated it to her. That's
13 pretty much it.

14 Q Do you recall when you stated this
15 position to Mr. Griffin?

16 A No, but I had been stating that position
17 on a regular basis to Mr. Griffin.

18 Q Do you recall when you would have stated
19 that position to Vivian?

20 A It was -- I don't know. I really don't.
21 No, I don't remember.

22 MR. OLSEN: Did you also state it in the
23 record in your complaint?

24 MR. TAYLOR: Pardon?

25 MR. OLSEN: If you want a complete list,

1 it's also stated in his complaint which was filed
2 the 22nd.

3 Q (By Mr. Taylor) Mr. Kelley --

4 A Let me just finish reading this.

5 Q Okay.

6 A I would say I agree with this letter, the
7 content.

8 Q Mr. Kelley, I'd like you to refer again
9 to Exhibit No. 2. There are a number of extensions
10 to that agreement which are attached to Exhibit 2.
11 Did you agree to each one of those extensions?

12 A Yes. I've got my signature. Yes.

13 Q Mr. Griffin's notes reflect that on
14 several occasions you called and asked where your
15 extensions were of the agreement. Do you disagree
16 with that?

17 A That I asked him where they were?

18 Q Yes.

19 MR. OLSEN: Do you want to read the
20 witness's testimony so he knows that that's an
21 accurate representation?

22 MR. TAYLOR: Sure. I'll be happy to.
23 Okay. I believe we've already referred to Mr.
24 Griffin's notes wherein he stated "Kelley wants a
25 letter of extension."

1 now?"

2 Q Are you aware of who prepared the
3 extensions?

4 A I believe it was Lantz that prepared
5 them.

6 Q You're not sure of that?

7 A And Vivian. Well, I think it was a
8 coordination between Lantz and Vivian.

9 Q Did you ever contact anyone and request
10 that the deal close?

11 A I certainly asked the question when was
12 the deal going to close and that I wanted it to
13 close, as I was trying to organize my family and my
14 life, and they just kept telling me that it was
15 being worked on.

16 Q They meaning whom?

17 A Don Griffin. And he referred to you on
18 occasion.

19 (Discussion off the record.)

20 Q Mr. Griffin's notes reflect that he had a
21 telephone conversation with me on July 17th and he's
22 got in quotes, apparently referring to my statement,
23 "If it gets hot and heavy, to have Kelley pay some
24 of the cost." And it also states above that that I
25 indicated to him that the bank is not obligated to

1 "Craig was thinking about maybe you should pick up
2 some of the costs."

3 Q (By Mr. Taylor) Do you recall what your
4 reply, if any, was to that statement?

5 A I guess my reply -- I don't really recall
6 my reply. No, I don't recall.

7 Q Do you recall any other conversations
8 during the course of the summer in which you
9 discussed with Mr. Griffin what First Security
10 Bank's position was with respect to the property?

11 A We discussed on and off throughout the
12 summer. It was basically that they were going to
13 clean up the problems, that they were going to --
14 that they were suing the Armstrongs, that they were
15 working on getting a quiet title, that they were so
16 on and so on and so on, and then towards mid August,
17 Don was getting very frustrated. He thought that
18 you were dragging your feet, that things weren't
19 moving all of a sudden, that things started to slow
20 down. He didn't know why.

21 He'd made several calls to Lantz, trying
22 to reach Lantz. Lantz wasn't returning his phone
23 calls. Couldn't understand why. Basically I think
24 that -- well, I don't know why. You know, he just
25 thought things had slowed down and that they weren't

1 MR. TAYLOR: Let's have that marked as an
2 exhibit.

3 MR. OLSEN: These are his letters with
4 notes. He's referring to your letter of September
5 17th to me.

6 THE WITNESS: Yeah. You gave me one of
7 these.

8 MR. OLSEN: He's made notes which were
9 prepared for this deposition and I'm not going to
10 put into the record. September 17, 1987 letter.

11 THE WITNESS: Your letter. First
12 Security will not consider the act of placing
13 \$140,000 in escrow as sufficient to close the deal.
14 That's your letter.

15 MR. OLSEN: But if you don't know, you
16 don't know.

17 THE WITNESS: No, I don't know. I'm just
18 saying -- I don't know when it was. I'm referring
19 to that statement and it's dated September 22nd. It
20 says Exhibit C here.

21 (Discussion off the record.)

22 Q (By Mr. Taylor) Just a couple of final
23 questions. On September the 22nd of 1987, which was
24 the deadline of First Security on which First
25 Security requested that you either purchase the

1 property as is or take your earnest money back and
2 walk from the deal, what was your position with
3 respect to that?

4 A Well, my position was that when I sent
5 you the telegram saying that I didn't want to walk
6 from the deal and my position was that I needed more
7 time now, up until that point I was under the
8 feelings or premise that First Security was taking
9 care of any of the problems and dealing with the
10 problems necessary to close this deal.

11 And then when I received the letter, it
12 was basically saying we are dropping away from this.
13 We feel that we don't want to handle this anymore
14 and we want to close with the problems still
15 existing on the property, and so I said, well, I
16 need to know what these problems are so I need time
17 to look into these problems.

18 I was concerned about the domestic water.
19 I didn't know whether I was going to have water in
20 the house. I was concerned about a lot of things
21 and so I needed some time to check these things out,
22 so I asked that I get the time to check these things
23 out. I was willing to go forward. I was willing to
24 close, but I needed information in order to
25 understand what was happening. Then things, for

1 some reason, started to get rough and it seemed like
2 there was this big push to close this, and yet in
3 one letter there it states that if I was willing to
4 take the case against the Armstrongs, sue the
5 Armstrongs, that First Security would basically
6 extend my extensions without any limit.

7 So basically I said I want to close the
8 property, I want to know what's going on with the
9 property, and basically I want to reserve my rights
10 to the changes that have taken place in this
11 property. I had a pond that was empty, I had dead
12 fish. I didn't know if I had water going into the
13 house. I didn't know what land I was going to get,
14 so I was -- I was willing to close and go forward
15 but I was not willing to give up my rights as far as
16 legal rights, that I was willing to let some judge
17 decide, you know, what rights I had in this case,
18 and that was the only thing that I was not willing
19 to give up, was what I consider my legal rights.

20 I felt that First Security was bullying
21 me and they were pushing me and for five months they
22 were -- nothing was happening. Everything was easy
23 going. Everything was fine. And then all of a
24 sudden I get a letter. I kept getting extensions,
25 30 days, 40 days, 50 days. Then all of a sudden I

1 get a letter that says you've got seven working days
2 to close this deal. So all of a sudden someone
3 decided to put the pressure on me, and I don't react
4 very well to pressure.

5 Q Do you have a copy of the letter that
6 you've indicated gave you seven days to close?

7 MR. OLSEN: It was Exhibit 2, wasn't it?
8 It's the September 4th letter.

9 THE WITNESS: September 4th letter.

10 MR. TAYLOR: I don't believe we've marked
11 that as an exhibit.

12 MR. OLSEN: It is exhibit --

13 THE WITNESS: It says Exhibit A on mine.

14 MR. OLSEN: It's Exhibit A to your
15 affidavit in support of the motion to dismiss.

16 MR. TAYLOR: I believe that's it. Is
17 that it right there?

18 THE WITNESS: Yeah, this is it.

19 MR. OLSEN: Do you want to work from that
20 copy? Let's just reference it as Exhibit A to the
21 affidavit of Craig Taylor filed in support of the
22 motion to dismiss in this lawsuit.

23 THE WITNESS: I received this on
24 September 8th, which was on Labor Day weekend, and I
25 was told that I had to close on September 15th, so

1 Q After you received my September 4th, 1987
2 letter, did you make an objection, a written
3 objection?

4 A I sent you a telegram.

5 Q A written objection?

6 A Yes, a written telegram stating to you
7 that I wanted more time. I think you made some
8 quote about that, if I chose, I could walk away, and
9 I wrote a telegram saying that I was not going to
10 walk away, that I wanted to buy the property. I
11 don't know where it is. Anyway, I responded with a
12 Mailgram to you.

13 Q But in that telegram you didn't make a
14 written objection to any of the boundary or water
15 problems; is that correct?

16 MR. OLSEN: The document speaks for
17 itself. It says what it says.

18 MR. TAYLOR: Well, we don't have that
19 telegram.

20 Q Do you have a different understanding
21 with respect to that telegram?

22 MR. OLSEN: We're talking about the
23 telegram that was attached to Mr. Kelley's affidavit
24 in support of the motion for summary judgment. That
25 was the only telegram sent.

1 THE WITNESS: That was a Mailgram. Your
2 statement was -- it was not this letter. It was
3 another letter. There's the letter. Received
4 extension notice, seven day notice of extension.
5 Received extension notice 9-8-87 for 9-15-87, seven
6 day notice of extension. Property, 320 West Snow
7 Lane, Park City. Will not walk away based on
8 history. Need normal 30 day extension. Attorney
9 David Olsen will contact you.

10 Q (By Mr. Taylor) My question is did you
11 ever make a written objection to the boundary or
12 water problems?

13 A No, I don't believe I did. I think that
14 I -- I know I talked with Don and there was no
15 reason to do that because I had not received
16 information that would entice me to do that and the
17 thing had been working and everyone was aware of the
18 problems and they were just going forward with them.

19 Q You received a title report; is that
20 correct?

21 A I don't know if I received a title
22 report.

23 Q But you just assumed that First Security
24 was resolving the problems?

25 A That's correct.

1 Q And that you have no other obligation?

2 A Right.

3 Q But to wait and let First Security
4 resolve the problem?

5 A Right, since they were the seller and I
6 was the buyer.

7 MR. TAYLOR: I have no further questions.

8 (Whereupon the taking of the deposition
9 was concluded at 3:05 p.m.)

10 * * * *

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25