

2001

# William D. Conrad Joan V. Conrad v. Donald A. Mower : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

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

Robert A. Echard; Patterson, Phillips, Gridley and Echard; Attorney for Plaintiffs-Respondents.  
William H. Henderson; Attorney for Appellant.

---

## Recommended Citation

Brief of Appellant, *Conrad v. Mower*, No. 14475.00 (Utah Supreme Court, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/1524](https://digitalcommons.law.byu.edu/byu_sc2/1524)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

RECEIVED  
LAW LIBRARY

1977

IN THE SUPREME COURT  
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

WILLIAM D. CONRAD and  
JOAN V. CONRAD,

Plaintiffs and Respondents

-v-

DONALD A. MOWER,

Defendant and Appellant

Case No. 14475

BRIEF OF APPELLANT

Appeal from Judgment of  
District Court for Salt Lake County, Utah  
Honorable G. Hal Taylor, Presiding

WILLIAM H. HENDERSON  
208 Metropolitan Law Building  
431 South Third East Street  
Salt Lake City, Utah 84111

Attorney for Appellant

ROBERT A. ECHARD  
Patterson, Phillips, Gridley  
& Echard  
427 - 27th Street  
Ogden, Utah 84401

Attorney for Respondents

FILED

JUL 22 1976

Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

	Page
NATURE OF CASE. . . . .	1
DISPOSITION OF THE CASE IN THE LOWER COURT. . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS. . . . .	2
 ARGUMENT:	
THE COMPLAINT SHOULD HAVE BEEN DISMISSED AS TO APPELLANT BECAUSE IT FAILED TO STATE A CAUSE OF ACTION AGAINST HIM. . . . .	4
1. THE ALLEGATIONS OF THE COMPLAINT. . . . .	4
First Cause of Action . . . . .	4
Second Cause of Action. . . . .	4
Third Cause of Action . . . . .	4
Fourth Cause of Action. . . . .	5
Fifth Cause of Action . . . . .	5
2. THE AUTHORITIES . . . . .	6
<u>Denver Elec. &amp; Neon Serv. Corp. -v- Gerald</u> <u>A. Phipps, Inc.</u> 354 P 2d 618 (1960) . . . . .	9
<u>Grover Irrigation &amp; Land Co. -v- Lovella</u> <u>Ditch Reservoir</u> 21 Wyo 204, 131 P 43 (1913) . . . . .	9
<u>Industrial Commission -v- Superior Court</u> 5 Ariz. App. 100 423 P 2d 375 (1967). . . . .	9
<u>Ivey -v- Housing Foundation of America</u> 73 F Supp 201 (1947). . . . .	7
<u>Perma Research and Development Company -v-</u> <u>The Singer Company</u> 410 Federal Reporter 2d 572 (1969) . . . . .	7

<u>White -v- Venkowski</u>	
37 Wis 2d 285, 155 NW 2d 74 (1967) . . . . .	8
<u>Utah Rules of Civil Procedure, Rule 9(b)</u> . . . . .	7
<u>3 Am. Jur. 2d, Title: Agency, p. 564, Sec. 294</u> . .	6
<u>37 Am. Jur. 2d, Title: Fraud &amp; Deceit, p. 922,</u> Sec. 60 . . . . .	7
<u>37 Am. Jur. 2d, Title: Fraud &amp; Deceit,</u> Sec. 327-328. . . . .	8
<u>27 C.J.S., Title: Dismissal &amp; Non-Suit,</u> Sec. 68, p. 455 . . . . .	8
<u>27 C.J.S., Title: Dismissal &amp; Non-Suit,</u> Sec. 70, p. 460 . . . . .	8

---

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

WILLIAM D. CONRAD and  
JOAN V. CONRAD,

Plaintiffs and Respondents

)  
)  
) Case No. 14475

-v-

DONALD A. MOWER,

Defendant and Appellant

---

B R I E F   O F   A P P E L L A N T

---

NATURE OF THE CASE

Actions by respondents against appellant for damages on contracts to provide and erect a pre-cut home, alleging fraud on defendant's ability to fulfill the contract, and alleging and praying for punitive damages.

DISPOSITION OF THE CASE IN THE LOWER COURT

The Lower Court (so far as is pertinent to this appeal) entered judgment against appellant in the sum of \$8000 damages, and \$1500 punitive damages.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and dismissal of the complaint.

### STATEMENT OF FACTS

Judgment in this case was also entered against Glen C. Anderson, Jr., in the sum of \$8000 damages and \$2500 punitive damages; and Anderson also appealed from the judgment.

On May 10, 1976, defendant Glen C. Anderson, Jr. withdrew his appeal and the District Court ordered Anderson's appeal dismissed (Record 377). Hence the only appellant remaining in this case is Donald A. Mower.

Appellant Mower did not order the transcript, having insufficient funds (Record 369). Defendant Glen C. Anderson, Jr. ordered a transcript, but the transcript was never completed and appeal was dismissed. Hence, appellant is appealing on the record minus the transcript and does not intend to rely on the transcript.

Appellant Mower's single point on appeal is that the Complaint does not state a cause of action as to him and should have been dismissed. This point was raised by appellant at every possible stage in the proceedings below, as follows:

On October 3, 1975, appellant moved the Court for Summary Judgment and Dismissal of the case on the grounds that "Plaintiffs have failed to state a cause of action as to defendant, Donald A. Mower" (Record 162). Hearing was had on said motion before District Judge Marcellus K. Snow on October 15, 1975. On October 31, 1975, the motions were denied (Record 182).

Trial was set for November 3, 1975.

On October 29, 1975, appellant moved the Court for judgment on the pleading on the grounds that the complaint did not state a cause of action against him. Appellant noticed his motion for hearing at the trial date (Record 176). In Points and Authorities in Support of Motion for Judgment on the pleadings, appellant set out that he had made a previous Motion to Dismiss before Judge Snow, and that said Motion was denied; and cited authorities to the effect that the stated cause of action is a basic effect that could be made and renewed at any stage of the case before the trial judge and on appeal (Record 177, 181).

On November 3, 1975, (day of the trial) the trial judge, Honorable G. Hal Taylor refused to entertain appellant's motion on the grounds that the same motion (in essence) had been made before Judge Snow and had been denied; which decision was binding on appellant. Later (appellant recalls) there was read into the transcript an order denying the motion.

On November 21, 1975, appellant moved for Judgment not withstanding the verdict and Motion for new trial based on the grounds "that the complaint did not state a cause of action against this defendant" (appellant Mower). By minute entry dated December 19, 1975, Judge Taylor denied this motion (Record 335, 352).

## ARGUMENT

### THE COMPLAINT SHOULD HAVE BEEN DISMISSED AS TO APPELLANT BECAUSE IT FAILED TO STATE A CAUSE OF ACTION AGAINST HIM

#### 1. THE ALLEGATIONS OF THE COMPLAINT (R. 1-10)

First Cause of Action: Respondents allege that on May 2, 193, they ordered a pre-cut Lindal Cedar Home from Intermountain Cedar Homes, Inc. "through its agents Donald A. Mower and Intermountain Cedar Homes, Inc." (para. 3, First Cause). The complaint then alleges a shortage of delivery, but the only damage alleged is against Lindal Cedar Homes, namely, "that the defendant, Lindal Cedar Homes, failed to deliver part of the items contracted for and, therefore, owes to the plaintiffs a rebate on the purchase price in the sum of \$2,200.00." (para. 4 First Cause)

Second Cause of Action: Respondents allege that on June 14, 1975, plaintiffs contracted with the Intermountain Cedar Homes "by and through its agent Donald A. Mower" to construct the home. (para. 2, Second Cause). They then allege that Intermountain Cedar Homes failed to complete it to the extent of \$3,000.00 and pay for supplies to the extent of \$5,000.00 and therefore, plaintiffs were damaged to the extent of \$8,000.00. (our emphasis)

Third Cause of Action: Respondents allege that appellant Mower "as an agent of Intermountain Cedar Homes" represented to plaintiffs "that he was an agent and officer of Town & Country Building Consultants, Inc." and that the latter corporation would



assume the responsibility of seeing the home was constructed in accordance with the original contract (para. 3, Third Cause). Also alleged against appellant Mower was that Town & Country "by and through its agent, Donald A. Mower" obligated itself to assist Intermountain Cedar Homes in completing the contracts (para. 5, Third Cause). No liability is alleged against Mower. It is alleged in paragraph 8 Third Cause that Intermountain Cedar Homes is liable for any and all acts performed by Town & Country Building Consultants, Inc. and are jointly liable for damages suffered by plaintiff.

Fourth Cause of Action: Respondents allege that defendant Anderson, "by and through its agent Donald A. Mower" fraudulently induced the plaintiff to enter into a contract to purchase a Lindal Cedar Home and to have Intermountain Cedar Homes, Inc. and Town & Country Building construct the said home. The fraud consists of allegations to the effect that defendant Anderson by his agent Mower, falsely represented that the plaintiffs would receive all the materials ordered from Lindal Cedar Homes, that the home would be constructed in a workmanlike manner by competent personnel, that the contracts for purchase of the homes and the construction of the homes would be performed by competent and licensed personnel and that the parties involved in construction "were financially solvent and able to perform said contract" (para. 7 Fourth Cause).

Fifth Cause of Action: Respondents incorporate the allegations re fraud of their Fourth Cause of Action and allege that defendant Mower acted as an agent of defendant Anderson and abetted Anderson

in perpetrating the fraud alleged in the Fourth Cause of Action.

## 2. THE AUTHORITIES

As mentioned above, the judgment awarded damages for breach of contract and punitive damages.

The Complaint does not allege a claim against appellant for breach of contract, nor does it allege a claim of fraud.

Further, punitive damages may not be awarded in breach of contract actions.

Respecting the allegations against appellant re contract, in 3 Am. Jur. 2d Title Agency, p. 564, Section 294, citing numerous authorities, it is stated:

"294. Liability on authorized contracts, generally.

"If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon, unless credit has been given expressly and exclusively to the agent and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone."

The court will notice that there is no allegation that credit was given expressly or exclusively to appellant Mower and that it was his intention to personally assume the obligation as a personal responsibility.

The allegations in the Fourth and Fifth Causes of Action attempting to allege an action in fraud are woefully insufficient

so do. In 37 Am. Jur. 2d, Title: Fraud and Deceit, Section 60, p. 922, it is stated:

"60. Generally; rule of nonliability.

"It is a general rule that fraud cannot be predicated upon statements which are promissory in their nature at the time they are made and which relate to future actions or conduct. Thus, fraud cannot be predicated upon the mere non-performance of a promise or contractual obligation or upon failure to fulfill an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Such nonperformance alone has frequently been held not even to constitute evidence of fraud."

Further, Rule 9(b) Utah Rules of Civil Procedure provides "that the circumstances constituting a fraud shall be stated with ~~Particularity~~ Particularity." In checking citations under the identical Rule of the Federal Rules of Civil Procedure, we find cases dealing precisely with respondents' allegations of fraud.

In Perma Research and Development Company v. The Singer Company, 410 Federal Reporter, 2d 572 (1969) the Court ruled:

"Allegation that contract was procured by fraud and misrepresentation on part of defendant and its agents as to its intentions and ability to market product was by itself plainly insufficient to state a claim for fraud. Fed. Rules Civ. Proc., Rule 9(b), 28 U.S.C.A."

In Ivey v. Housing Foundation of America, 73 F. Supp. 201, (1947) the Court ruled:

"A complaint alleging that plaintiffs, relying on defendant corporation's representations, paid specified sum for contract giving plaintiffs right to act as distributors of corporation's prefabricated houses, and that such corporation falsely

represented to plaintiffs that it was able to fulfill its undertakings to manufacture and deliver such houses, was insufficient to state cause of action for fraud."

Further: When contracts are involved and fraud is claimed, the party claiming fraud has alternative remedies; namely, sue on the contract or the fraud. The remedies are mutually inconsistent and a election of remedies must be made. See 37 Am. Jur. 2d Title Fraud and Deceit Sec. 327-328.

It follows, as is stated in White v. Venkowski, 37 Wis. 2d 285, 155 NW 2d 74 (1967):

"Pursuasive authority from other jurisdictions supports the proposition (without exception) that punitive damages are not available in breach of contract actions. This is true even if the breach as in the instant case is willful."

The failure to state a cause of action is a basic defect. It can be made and renewed at any stage of the case, before the trial judge and even on appeal.

In 27 C. J. S. Title: Dismissal & Non-Suit, Section 68, p. 455 it is stated:

"A Motion to Dismiss on the grounds that no cause of action is set forth may be made at any time before verdict."

In 27 C.J.S., Section 70, p. 460, it states:

"Renewal of Motion: When it does not clearly appear why the first motion was not allowed it is no reason why the motion should not be presented again. It is also been held that such a motion may be renewed on appeal."

In Industrial Commission v. Superior Court, 5 Ariz. App. 100  
423 P. 2d 375 (1967) the court ruled:

"Denial of motion to dismiss where no cause of  
action exists constitutes an assumption of judicial  
power not granted by law."

In Denver Elec. & Neon Serv. Corp. v. Gerald A. Phipps, Inc.  
(Colo.) 354 P. 2d 618 (1960) the court ruled:

"Trial Court's order denying motion to dismiss  
certain claims in complaint was subject to modifi-  
cation, and trial court, acting through another  
judge, could entertain and grant the motion to  
dismiss despite the previous denial of the motion."

See also Grover Irrigation & Land Co. v. Lovella Ditch  
Reservoir, 21 Wyo 204, 131 P. 43 (1913) where the court ruled that  
objection of a complaint to state a cause of action "may be made  
for the first time on appeal."

It is respectfully submitted that the Lower Court's failure  
to dismiss the complaint as to appellant was error and its judgment  
against appellant should be reversed.

Dated: July 23, 1976.

Respectfully submitted,

  
WILLIAM H. HENDERSON  
Attorney for Appellant

RECEIVED  
LAW LIBRARY

IN 1977

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School