

1987

Lee A. Fitzgerald and Helen Fitzgerald, his wife v. Boyd Corbett and Keith Gurr : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



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.

James R. Brown; Jardine, Linebaugh, Brown and Dunn.

M. Dayle Jeffs; Jeffs and Jeffs, P.C.

Recommended Citation

Brief of Respondent, *Lee A. Fitzgerald and Helen Fitzgerald v. Boyd Corbett, Keith Gurr*, No. 870444.00 (Utah Supreme Court, 1987).
https://digitalcommons.law.byu.edu/byu_sc1/1774

This Brief of Respondent 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO:

UTAH SUPREME COURT

BRIEF

870444

IN THE SUPREME COURT OF THE STATE OF UTAH

LEE A. FITZGERALD and
HELEN FITZGERALD, his wife,

Plaintiffs/Appellants,

vs.

BOYD CORBETT and KEITH GURR,

Defendants/Respondents.

Case No. 870444

14(b)

BRIEF OF RESPONDENTS

An Appeal from the Judgment of the Fourth Judicial
District Court dated October 27, 1987
Honorable George E. Ballif, Judge

James R. Brown
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

M. Dayle Jeffs
Jeffs and Jeffs, P.C.
90 North 100 East
P. O. Box 888
Provo, UT 84603
Telephone: (801) 373-8848

FILED
APR 21 1989

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

LEE A. FITZGERALD and)	
HELEN FITZGERALD, his wife,)	
)	Case No. 870444
Plaintiffs/Appellants,)	
)	
vs.)	
)	
BOYD CORBETT and KEITH GURR,)	
)	
Defendants/Respondents.)	

BRIEF OF RESPONDENTS

An Appeal from the Judgment of the Fourth Judicial
District Court dated October 27, 1987
Honorable George E. Ballif, Judge

James R. Brown
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

M. Dayle Jeffs
Jeffs and Jeffs, P.C.
90 North 100 East
P. O. Box 888
Provo, UT 84603
Telephone: (801) 373-8848

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
JURISDICTION	1
NATURE OF THE PROCEEDINGS BELOW.	1
ISSUES PRESENTED ON APPEAL	1
STATEMENT OF THE CASE.	2
SUMMARY OF ARGUMENT.	7
ARGUMENT	10
POINT I THE TRIAL COURT CORRECTLY HELD THE SETTLEMENT AGREEMENT TO BE ENFORCEABLE .	10
POINT II THE OPEN COURT OFFER WAS A KNOWN DEFINITION OF THE SETTLEMENT AGREEMENT PROVISION.	16
POINT III THE SUPREME COURT'S RULING IS NOT RES JUDICATA ON THE SUBSEQUENT SETTLEMENT AGREEMENT OF SEPTEMBER 1982.	22
POINT IV FITZGERALDS FAILED TO SHOW ANY DAMAGES ON THEIR COMPLAINT	26
POINT V CORBETT AND GURR ARE ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL. . . .	31
CONCLUSION	32

TABLE OF AUTHORITIES

<u>RULES CITED</u>	<u>Page</u>
Rule 11 of the Utah Rules of Civil Procedure	9,11
Rule 12(h) of the Utah Rules of Civil Procedure.	22
Rule 3 of the Rules of the Supreme Court	1
Rule 33(a) of the Rules of the Supreme Court	9,31,32
<u>CASES CITED</u>	
<u>Backstrom Family Ltd. Partnership v. Hall</u> , 751 P.2d 1157 (Ut. Ct. App. 1988).	10,31
<u>Barber v. The Emporium Partnership</u> , 750 P.2d 202 (Ut. Ct. App. 1988)	31
<u>Barker v. Francis</u> , 741 P.2d 548 (Ut. Ct. App. 1987).	20
<u>Brigham City v. Mantua Town</u> , 754 P.2d 1230 (Utah Ct. App. 1988).	31
<u>Corbett v. Fitzgerald</u> , 709 P.2d 384 (Utah 1985).	26
<u>Madsen v. Borthwick</u> , 97 U.A.R. 13 (Dec. 12, 1988).	8,25
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah Ct. App. 1987)	31
<u>Porco v. Porco</u> , 752 P.2d 365 (Ut. Ct. App. 1988)	31
<u>Power Systems and Controls v. Keith's Electrical Construction Co.</u> , 765 P.2d 5, 97 U.A.R. 34.	32
<u>Wheeler v. Mann</u> , 763 P.2d 758, 86 U.A.R. (6-30-88)	21

STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered by the Fourth Judicial District Court on the 27th of October, 1987, and jurisdiction is conferred upon this Court pursuant to Rule 3 of the Rules of the Utah Supreme Court.

NATURE OF THE PROCEEDINGS BELOW

Fitzgeralds filed a complaint for slander of title to remove two notices of interest recorded by Corbett. Corbett and Gurr filed an Answer and Counterclaim. The case was tried by the Court sitting without a jury on October 24, 1985. Further hearings were heard on October 24, 1986, November 6, 1986, and September 18, 1987. The trial court entered judgment removing the Notices of Interest, and denied damages to Fitzgeralds, since no damages were proven, and ordered Fitzgeralds to deliver a deed to 320 acres to Corbett and Gurr upon payment of \$11,000.00 and to deliver deeds to five purchasers of properties from Corbett and Gurr. The court entered Amended Findings of Fact and Conclusions of Law and Judgment on October 27, 1987.

ISSUES PRESENTED ON APPEAL

1. Is the Settlement Agreement of September 10, 1982, enforceable?

2. Were the provisions of the Settlement Agreement requiring Fitzgeralds to honor past sales of Corbett and Gurr barred by the doctrine of res judicata?

3. Did the trial court err in failing to award damages for the slander of title?

STATEMENT OF THE CASE

Corbett and Gurr were originally partners in a partnership known as Utah Ranchlands (R. 221). Utah Ranchlands was terminated in September 1981. Mr. Corbett, without Mr. Gurr's knowledge, filed two Notices of Interest. The first Notice of Interest was filed November 1, 1982 (Exhibit 2) and the second was filed April 18, 1984 (Exhibit 3). The Notices of Interest covered lands owned by Lee and Helen Fitzgerald, (hereinafter "Fitzgeralds"), which were the subject matter of contracts wherein Corbett and Gurr purchased from Fitzgeralds (Exhibits 3 and 4). Corbett and Gurr had in turn resold some of the land to third parties (Exhibits 15, 16, 16A, 17, 18, 30).

Mr. Corbett filed the Notices to protect the third-party purchasers. Fitzgeralds commenced this action to cause Corbett to remove the Notices and for damages for slander and/or clouding of Fitzgeralds' title. Corbett and Gurr

counterclaimed and sought performance from Fitzgeralds under an Agreement dated September 10, 1982, denoted as Settlement Agreement (Exhibits 11 and 12, R. 31-36).

Corbett and Gurr were Plaintiffs in an earlier action against Lee and Helen Fitzgerald and Perry and Carolyn Fitzgerald in case no. 50224. The issues in 50224 were:

- a) Corbett and Gurr sought to enforce the May 1977 Earnest Money Contract;
- b) whether the June 1978 payment on the May 1977 contract was timely;
- c) whether the September 1977 option was timely exercised;
- d) whether the interest of Corbett and Gurr in the May 1977 contract could be terminated;
- e) what damages, if any, flowed to the respective parties (Exhibit 29).

The trial court, Judge Bullock, held the May 1977 contract was terminated and ordered rescission (May 4, 1982 Judgment, Exhibit 10). Thereafter, on April 17, 1983, Judge Bullock amended the Judgment for monetary damages in favor of Carolyn and Perry Fitzgerald since Corbett and Gurr were incapable of returning the eight-plex to Perry and Carolyn Fitzgerald (Exhibit 5).

As part of the final argument by Lee and Helen Fitzgerald's counsel in 50224, Mr. Jeffs offered in open court that if the court would terminate the May 1977 contract, Lee and Helen Fitzgerald would honor all contracts of sale which Corbett and Gurr had entered into with innocent third party purchasers for the remaining balances due from the purchases, if any. This offer was acknowledged by Judge Bullock's ruling in the May 4, 1982 Judgment and the April 17, 1983 Amended Judgment.

Corbett and Gurr filed three Notices of Appeal in 50224. They were:

- a) May 17, 1982, Appeal No. 18529 (from the Memorandum Decision);
- b) June 29, 1982, Appeal No. 18594 (from the formal Judgment on the Memorandum Decision);
- c) May 17, 1983, Appeal No. 19225 (from the Amended Judgment of April 17, 1983).

In response to the Settlement Agreement of September 10, 1982, Corbett and Gurr instructed their counsel not to oppose a motion to dismiss the appeals numbered 18529 and 18594 and on November 1, 1982, these appeals were dismissed (Exhibit 4, R. 264-6). This Court held on November 1, 1985 in the Appeal No. 19225 which only addressed the Amended Judgment of April 17,

1983 as to the appropriateness of the monetary damages in light of Corbett and Gurr's inability to return the eight-plex. A copy of the decision is in Appellants' Addendum No. 18.

After the litigation was concluded by the formal judgment on May 1982 in 50224 and Corbett and Gurr had filed the second Notice of Appeal, a Settlement Agreement, dated September 10, 1982 was entered into by the parties (Exhibits 11 and 12, R. 259). The Settlement Agreement required the following to be done:

- a) Corbett and Gurr to dismiss the appeals;
- b) Corbett and Gurr to pay approximately \$49,000.00 (after offset of \$4,700.00 judgment);
- c) Corbett and Gurr to pay \$3,667.00 per year for three years commencing in February 1983 in exchange for 320 acres;
- d) Fitzgeralds would honor the sales of Corbett and Gurr to the third-party purchasers;
- e) Fitzgeralds would deed the 320 acres to Corbett and Gurr upon the payment of \$11,000.00 (Exhibits 11 and 12).

Corbett and Gurr requested their attorney to not respond to Fitzgerald's motion to dismiss the appeals (18529 and 18594), which effectuated a dismissal on November 1, 1982 of the appeals (Exhibit 4).

Gurr paid the \$49,000.00 payment on or before October 4, 1982. Fitzgerald accepted the payment. Fitzgerald then wrote to Corbett and Gurr and asked to be advised of who had purchased from Corbett and Gurr so he could honor those contracts (Exhibits 19 and 20, R. 289-290). There are five contract purchasers which still have not been honored (R. 141-2, Exhibits 15, 16, 16A, 17, 18, 30).

Thereafter, Fitzgerald requested the payment of \$3,667 from Gurr (R. 309). Gurr wanted to pay Fitzgerald but Fitzgerald hadn't honored the five purchaser's contracts. Gurr desired to have Fitzgerald honor the contracts and pay the \$11,000.00 all at one and conclude the contract. Fitzgerald was to get back to Gurr about honoring the contracts. Gurr has been ready, willing, and able to pay the \$11,000.00 and offered to do so in open court (R. 309).

Fitzgeralds acknowledged at the beginning of the trial that Gurr had no responsibility for the filing of the Notices of Interest and that the Complaint should be dismissed as against Gurr (R. 221).

Fitzgerald asserted that his title to the real property had been slandered and/or clouded as a result of the two Notices of Interest. Fitzgerald asserted that he had been required to incur attorneys' fees and costs in the

"Bell-Badger" litigation and had lost some interest on payments that Bell had refused to pay, but subsequently did pay. The admissions of Fitzgerald disclosed the "Bell-Badger" litigation was commenced before either of the Notices were filed and that Fitzgerald had settled with Mr. Bell on all issues except interest which is still pending before the Court in the Bell-Badger litigation (R. 337-338, 246-247).

Corbett and Gurr in their counterclaim sought performance on behalf of Fitzgerald under the Settlement Agreement of September 10, 1982 (R. 31-37).

SUMMARY OF ARGUMENTS

POINT I

THE SETTLEMENT AGREEMENT OF SEPTEMBER 10, 1982 IS ENFORCEABLE

A. The Settlement Agreement was executed by all parties.

B. Corbett and Gurr dismissed the appeals, satisfied the \$4,700 judgment and paid the \$49,000 consideration to Fitzgeralds.

C. Gurr has offered and is still willing and able to pay the \$11,000 for the 320 acres.

D. Fitzgeralds acknowledged the dismissals of the appeals and receipt of the \$49,000 payment.

E. All parties understood the terms of honoring the contracts to third-party purchasers.

POINT II

THE SETTLEMENT AGREEMENT IS NOT BARRED BY RES JUDICATA AND/OR CLAIM PRECLUSION

A. The issues in 50224 did not include the September 10, 1982 Agreement since the Agreement did not come into existence until after the case was concluded.

B. The open court offer by Mr. Jeffs simply defines the terms in the September 10, 1982 Agreement.

C. The September 10, 1982 Agreement was attached to the Corbett's Appellant Brief "for informational purposes only" and the issue of enforceability of the September 10, 1982 Agreement has never been addressed by any court other than Judge Ballif in this proceeding.

D. The elements for claim preclusion are not present in this instance, as provided in Madsen v. Borthick, 97 U.A.R. 13 (December 12, 1988).

POINT III

FITZGERALDS FAILED TO SHOW ANY DAMAGES AS A RESULT OF THE NOTICES OF INTEREST

A. Fitzgeralds asserted the damages were attorney fees and costs incurred in the "Bell-Badger" litigation.

B. Fitzgeralds also asserted lost interest on the payment due from Bell.

C. On cross examination, Fitzgeralds admitted the Bell-Badger litigation was before the filing of any Notice.

D. Fitzgeralds settled the Bell matter and reserved the interest issue. Bell has agreed to honor his contract and has made the past due payments.

E. The litigation and the withholding of payments had nothing to do with the Notices.

POINT IV

CORBETT AND GURR ARE ENTITLED TO ATTORNEY FEES AND COSTS FOR THIS APPEAL

A. Under Rule 11 of the Utah Rules of Civil Procedure and Rule 33(a) of the Rules of the Supreme Court provide for attorney fees and costs under a frivolous appeal.

B. There is substantial, unrebutted, admissable evidence supporting the trial court's findings and judgment.

C. This appeal was perfected without "the careful consideration of the evidence and the law" as required under Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Ut. Ct. App. 1988).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THE SETTLEMENT AGREEMENT TO BE ENFORCEABLE

On September 10, 1982, Corbett & Gurr entered into the Settlement Agreement. Mr. Fitzgerald testified at page 287 of the record:

Q And, specifically, drawing your attention to Exhibit No. 11--I believe it's the first one right there on the corner--does that document bear your signature and the signature of your wife?

A Yes, it does, and I was present when my wife signed it.

Mr. Corbett testified at pages 259 and 260:

Q (By Mr. Brown) Mr. Corbett, was there a point in time in September of 1982 that an Agreement was entered into between you and Mr. Gurr and the Fitzgeralds?

A Yes, there was.

. . .

Q What kind of a document is that?

A It's a "SETTLEMENT AGREEMENT." It is between Lee Fitzgerald, Keith Gurr and Boyd Corbett.

Part of the consideration or performance on behalf of Corbett and Gurr required Corbett and Gurr to dismiss the Appeals, and to pay approximately \$49,000.00, plus \$3,666.00 per year for 3 years for 320 Acres. At page 264 Mr. Corbett testified:

Q In fact, Mr. Corbett, the appeal by Mr. Stubbs was dismissed on your behalf, wasn't it?

A Okay. At that time, yes. Yes. And, in fact, we dismissed our appeal to the Supreme Court. That's right.

Q And subsequent to that time, did you know of or offer to pay the \$11,000.00 as required in the Settlement Agreement?

A Yes, we did.

Again at pages 265 and 266:

Q Did you cause a Release of Judgment to be made in reliance upon the Settlement Agreement?

A We made a payment of \$49,000.00. We made that payment, yes.

. . .

Q (By Mr. Brown) Let me show you what has been marked for identification purposes, Defendants' Exhibit No. 13, sir, and ask you if you can identify that?

A That is a "RELEASE OF JUDGMENT," which we gave Lee Fitzgerald when we made our \$49,000.00 payment.

Q I show you what has been marked Exhibit No. 14, and ask you if you can identify that document, sir?

A Yes. This was tied in with that \$49,000.00 payment. The payment was actually \$54,000.00, but there was the \$47,000.00 [sic] to our credit, leaving a net balance of \$49,000.00 due on that same date. Yes.

Mr. Jeffs cross-examined Mr. Corbett at page 284 when Mr. Corbett testified as follows:

Q In fact, you paid it [the \$49,000.00 payment] on October 4th, 1982, isn't that correct?

A I don't know; I cannot say.

Q But you're not disputing that, though?

A No. As I remember, it was not paid on that day, no.

Q It was not paid on that day?

A No. But it was paid within a time to conform to the underlying contract, which it made reference to, and Mr. Fitzgerald accepted the money. (emphasis supplied)

Mr. Gurr testified at page 328:

Q (By Mr. Brown) Did you, in fact, execute that Agreement, Mr. Gurr?

A Yes. I authorized it by signing it.

Q And when did you sign it in relationship to September the 10th of 1982?

A Well, I believe it was probably the same day, because Boyd, as I recall, he dropped by and had me sign it.

Mr. Gurr testified about the payment of the \$49,000.00 and the \$11,000.00 at page 309 where he stated:

Q Now, subsequent to that time [execution of Exhibit 11], sir, did you cause to be paid the payment of approximately \$49,000.00 on the DuPratt contract?

A DuPratt contract, yes.

Q The DuPratt payment to be made?

A Yes.

Q Did you have any discussion with Mr. Fitzgerald about the \$11,000.00 for the payment of the annual installment of the thirty-six hundred and sixty-seven dollars for the three hundred and twenty acres?

A I was waiting, you know, for something to happen on this thing. I went down to Lee's place several times, and I talked to him on the phone quite a bit, and he wanted to know when I was going to pay that three-thousand-something dollars, as I recall.

Q And what did you reply?

A I said, "Lee, what I would like to do is just get the whole thing settled up and pay you off in full on it."

Q And what reply did he make to you?

A It seems like he said that he would work on it, that he was working for some contracts from Corbett.

Q Are you ready, willing and able today to make the \$11,000.00 payment?

A Yes.

The appeals were dismissed on November 1, 1982. See Exhibit 4. After the dismissal of the appeals, and receipt of the payment of \$49,000.00 on October 4, 1982 in conformance with the Settlement Agreement, Mr. Fitzgerald wrote two letters, one to Corbett and Gurr and the other to Murdocks. These letters appear as Exhibits 19 and 20. Exhibit 20, a letter dated November 19, 1982 provides in part:

Now that your appeal has been dismissed from the Supreme Court, I would like a list of all the names of those who are purchasers on contract of ground in Cedar Valley effected in this lawsuit.

At page 341, Mr. Fitzgerald testified as follows:

Q (Mr. Brown) . . . Exhibit No. 20, which is a letter that you sent to Mr. Corbett and Mr. Gurr, which you have already acknowledged signing, is that correct?

A Yes.

Q And in that letter, and I quote you saying, "Now that your appeal has been dismissed" that was obviously one of the things to be done in Exhibit Nos. 11 and 12, isn't it?

A Yes. Nothing could be done until it was dismissed. Yes.

Q All right. And then you go on and say "dismissed from the Supreme Court, I would like a list of all the names of those who are purchasers on contract of ground in Cedar Valley effected in this lawsuit." Now, you wanted to get a hold of them immediately and honor all legitimate claims, is that correct?

A Yes.

Q That was your intent?

A That was my intention.

Q Now, this, obviously, was after the payment had been received on October 4th of 1982, wasn't it?

A Yes.

Again at page 343:

Q And here on November the 19th, you said "Now that your appeal has been dismissed from the Supreme Court, I would like a list of all the names of those who are purchasers on contract of ground in Cedar Valley," correct?

A Correct.

Q And that is after you had received the so-called tardy payment, if I can use that term, of the \$49,000.00?

A That would be correct.

Q Now, at that point in time you are going to say now, I want to honor those contracts, correct?

A Yes.

Q And that is exactly, sir, is it not, what Mr. Corbett has said in Exhibit No. 2, I believe, the Notice of Interest, that says to you, and the whole world, that we want you to honor those contracts covering those lands, isn't that correct?

A Yes.

Fitzgerald in the Appellant's Brief makes an argument that the \$49,000.00 payment had to be on the 10th of September, 1982; that the time for payment was a condition precedent. However, Fitzgerald acknowledged that he wanted to honor the contracts after he received the tardy payment.

Mr. Gurr further testified at page 311:

Q Now, when you made the payment to Mr. Fitzgerald for the \$49,000.00, or thereabouts on the DuPratt contract, did he object to the receipt of that payment?

A No.

If there was a condition precedent, that condition was waived by Fitzgeralds. There was ample consideration in that the appeals were dismissed, satisfaction of the \$4,700.00 judgment and payment of \$49,000.00 on October 4, 1982. Mr. Gurr tried to pay the whole \$11,000.00 for the 320 acres.

POINT II

THE OPEN COURT OFFER WAS A KNOWN DEFINITION OF THE SETTLEMENT AGREEMENT PROVISION

The Settlement Agreement of September 10, 1982 provided in part:

Fitzgeralds agree to honor all Corbett and Gurr's previous sales.

Fitzgeralds argue, in the Appellant's Brief:

a. That submission of the trial transcript (Exhibit 9) is improper because the contract must contain all of the essential provisions. (Point III)

b. That the contract provision cited above is clearly ambiguous (Point IV).

Fitzgeralds admit that the Court may receive extrinsic evidence if the contract is ambiguous. Appellant's Brief provide in pertinent part:

In the case at bar, the contract was clearly ambiguous as to what it meant in the contract to "honor all Corbett and Gurr's previous sales." The Court nevertheless went on to order specific performance. The order to convey title is deficient in several respects:

A. There was no evidence that Fitzgeralds had title to the properties which were the subject matter of the sales of Corbett and Gurr, and could convey title as ordered by the Court.

B. There was an ambiguity and no explanation given as to who was to get the funds already paid to Corbett and Gurr on their previous sales, as they had done in prior contracts, as testified to by Lee Fitzgerald.

C. There was no testimony on what sales the parties were contemplating when they signed the Settlement Agreement.

D. What does "honor Corbett and Gurr's previous sales" mean?

In order to enter the judgment the trial court had to rewrite terms into that Settlement Agreement that were neither set

forth in the Agreement itself not testified to by any of the parties to the action.

The foregoing assertion is incorrect. The parties testified as follows:

Mr. Fitzgerald at pages 341-342:

Q . . . Exhibit No. 20, which is a letter that you sent to Mr. Corbett and Mr. Gurr, which you have already acknowledged signing, is that correct?

A Yes.

Q And in that letter, and I quote you saying, "Now that your appeal has been dismissed" that was obviously one of the things to be done in Exhibit Nos. 11 and 12, isn't it?

A Yes. Nothing could be done until it was dismissed. Yes.

Q All right. And then you go on and say "dismissed from the Supreme Court, I would like a list of all the names of those who are purchasers on contract of ground in Cedar Valley effected in this lawsuit." Now, you wanted to get a hold of them immediately and honor all legitimate claims, is that correct?

A Yes.

Q That was your intent?

A That was my intention.

Q Now, this, obviously, was after the payment had been received on October 4th of 1982, wasn't it?

A Yes.

Q And at that point in time you told Mr. Corbett and Mr. Gurr, "I want to go forward and I want to honor every contract that is legitimate." Isn't that what you have said?

A Not only legitimate, it had to be a previous contract, previous to the lawsuit, and it had to be an innocent bona fide purchaser.

Mr. Corbett at page 251, in answer to the terms of the Settlement Agreement, stated:

A Yes. Mr. Jeffs, on behalf of Mr. Fitzgerald, stated in open court that if Judge Bullock would rule in their favor, that they had somewhere around 27,000 acres of land, and that they did not want any innocent buyers to be hurt because of any decision Judge Bullock might render. And that this 27,000 acres was available to give to these innocent third party buyers. And this was given without any conditions, whatsoever. And this offer was made regardless of the amount paid. If they paid for it all, Mr. Jeffs said that they would get their land, regardless of the amount paid.

All parties knew of the open court offer which is contained in Exhibit 9, which provides:

Mr. Fitzgerald and Mrs. Fitzgerald had owned and purchased in excess of 27,000 acres in Cedar Valley for eventual development and sale. This lawsuit and the publicity surrounding it has been damaging to that sales effort, that development effort. We, Mr. and Mrs. Fitzgerald, do not want the persons who have bought from Corbett and Gurr to be hurt. And so we are suggesting to the Court that an equitable verdict on termination would be if the Court would terminate Corbett and Gurr out and enter as a part of that termination order that Lee and Helen Fitzgerald honor all of the

contracts that Corbett and Gurr have entered into with innocent bona fide purchasers of property under that contract. And they will do so and they are willing to do it for the remaining unpaid balance. If the persons have paid it all and not got their title, he'll just give them their title for nothing. If they've paid all but the last payment, he will take the last payment and give them their title. So that no persons will be hurt as a result of the terminating of the Corbett and Gurr contract. They will all be honored, if they are bona fide purchasers. I'm not talking about contractors that like the price, I'm talking about bona fide purchasers of land who would be purchasers.

If the Court goes the other way and enforces it, then you've got all of the contracts that Fitzgerald has entered into, and those people are going to get hurt. But we think that the equitable remedy would be to honor those contracts, give the people the land that they bought for whatever is the remaining balance under the contract, and we are suggesting that the Court enter such an order as an equitable part of the termination of the Corbett and Gurr May contract. (emphasis supplied)

In Barker v. Francis, 741 P.2d 548 (Utah 1987) the Court of Appeals stated at page 551:

It is not necessary, however, that the contract itself contain all the particulars of the agreement. The crucial factor is that the parties agreed on the essential elements of the contract.

The receipt of Exhibit 9 was not to "make a new contract for the parties" but to interpret the contract, as the parties clearly understood the existing terms to mean. The term

"Fitzgeralds agree to honor all Corbett and Gurr's previous sales" means exactly what all parties testified to and as expressly stated by Fitzgerald's counsel in Exhibit 9.

The testimony is unrebutted as to the five contracts of purchasers under Corbett and Gurr. They consist of:

- a. James D. and Judy R. Alvey (Exhibit 15)
- b. James E. Pratt (Exhibit 16 and 16A)
- c. Vern H. Bolinder (Exhibit 17)
- d. Dale E. Beus (Exhibit 24)
- e. Lynn N. Murdock and Nina S. Murdock (Exhibit 30).

Fitzgeralds are entitled to the remaining payments on the Alvey contract of \$17,279.91 as of September 10, 1982, together with interest. All other purchasers had paid in full the consideration for their purchases before September 10, 1982.

Finally, For the first time, Fitzgeralds raise the issue on appeal that there was no evidence that Fitzgeralds had title to the ground. First, that's a "new" defense and cannot be raised on appeal for the first time. See Wheeler v. Mann, 763 P.2d 758 (Utah 6-30-88), 86 Utah Adv. Rep. 3:

Hence, defendant's claim is not properly before this Court since it may not be raised for the first time on appeal. Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). We, therefore, decline to consider the argument.

Second, the defense of impossibility is an affirmative defense which must be plead or is otherwise waived under Rule 12(h) of the Utah Rules of Civil Procedure. That Rule provides in pertinent part:

A party waives all defenses and objections which he does not present either by motion as herein before provided or, if he has made no motion, in his answer or reply . . .

The Reply to the Counterclaim is conspicuous by its absence of any affirmative defenses.

POINT III

THE SUPREME COURT'S RULING IS NOT RES JUDICATA ON THE SUBSEQUENT SETTLEMENT AGREEMENT OF SEPTEMBER 1982

Fitzgeralds argue that the Supreme Court ruling is res judicata and/or claim preclusion on the issue of specific performance of the Settlement Agreement (Point II). However, the issue of the Settlement Agreement of September 10, 1982 was a separate contract, not the subject matter of the litigation in 50224. When asked by the trial court, counsel replied:

THE COURT: This Agreement [Exhibits 11 and 12] is before the Supreme Court?

MR. BROWN: I don't think it is, your Honor. I think what is before the Supreme Court, your Honor, is what Mr. Jeffs offered in his Closing Arguments, if you will relative to having the same subject matter, if you will. But that is what was before the Supreme Court. That's the only thing that could be appealed. This agreement in September was not before Judge Bullock in Case No. 50224.

. . .

MR. JEFFS: And I intend to offer their briefs on appeal to show that it is on the case in the appeal, and I have Page 22 of their brief where it says, "After said dismissal, Mr. Fitzgerald refused not only to honor the Stipulations made in open court, which was subsequently refused to the Court's Memorandum Decision, but obviously omitted from the final Judgment. But he also refused to honor the subsequent written Agreements, a copy of the subsequent written agreement attached to this brief for informational purposes only." That's what it says in their brief.

THE COURT: "For informational purposes only." I don't know that that is before this Court.

Judge Bullock did not rule in 50224 whether Corbett and Gurr signed the Settlement Agreement; whether there was consideration; whether Fitzgerald's had to honor "Corbett and Gurr's previous sales." Those issues were decided by Judge Ballif in this action. Judge Bullock did not have the September 10, 1982 Settlement Agreement before him to rule upon. It didn't even exist at the time of the offer of Mr. Jeffs.

What was before the Supreme Court in Case No. 19225, (District Court No. 50224), was:

1. The enforcement of the original Earnest Money Agreement between Corbett-Gurr and Fitzgeralds dated May 1, 1977;

2. whether the June 1978 payment on the May 1977 contract was timely;

3. whether the September 1977 option was timely exercised;

4. whether Corbett-Gurr's interest in the May 1977 contract was legally terminated.

5. whether the stipulation made by Mr. Jeffs in open court should be made a part of the final judgment; (this was specifically rejected by the trial court in the April 17, 1983 Amended Judgment;

6. whether there were damages to Corbett and Gurr.

(Exhibit 29)

The stipulation in open court which appears as Exhibit 9 in this case is not the contract of September 10, 1982. The September 10, 1982 Settlement Agreement is a contract which was not the subject matter of the 50224 case. It could not have been because that contract (the Settlement Agreement of

September 10, 1982) was not entered into until after Judge Bullock had made his decision in May 1982.

Judge Bullock did amend the Judgment on April 19, 1983. However, he rejected the so-called offer of Mr. Jeffs. The offer of Mr. Jeffs was not part of either Judgment (May 4, 1982 or April 19, 1983). The Settlement Agreement was a separate and distinct contract which must be performed in its own right independent of the May 4, 1982 or April 19, 1983 Judgment in 50024.

Counsel for the Appellant makes the mistake of construing the understanding of all parties, as manifested in his open court offer, to define the term "Fitzgeralds agree to honor all Corbett and Gurr's previous sales" as an adjudication on the September 10, 1982 Settlement Agreement. Such is not the case. The open court offer of Mr. Jeffs simply verbalizes the understanding of the parties of the terms contained in the September 10, 1982 Settlement Agreement.

There is no dispute as to the law and the proper application of claim preclusion. Madsen v. Borthick, 97 U.A.R. 13 (December 12, 1988) sets forth the applicable law and standard, where this Court declared at page 14:

Claim preclusion bars a cause of action only if the suit in which that cause of action is being asserted and the prior suit satisfy three requirements. First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first

suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

The second and third elements are missing in this instance. The enforceability of the September 10, 1982 Settlement Agreement was not the subject matter of the trial court nor could it have been without an amendment to the pleadings. No amendment exists. The decision of this Court in Corbett v. Fitzgerald, 709 P.2d 384 (Utah 1985) therefore is not a final judgment on the September 10, 1982 Agreement.

POINT IV

FITZGERALDS FAILED TO SHOW ANY DAMAGES ON THEIR COMPLAINT

Mr. Fitzgerald asserted that the two "Notices of Interest" (Exhibit 2 and 3) filed by Mr. Corbett should be removed and for damages for "clouding" the title. The Court held the "Notices" should be removed and found that Fitzgerald did not prove any damages. Fitzgeralds admitted at the very beginning of the trial that there could not be any damages under any circumstances against Gurr. At page 221, Mr. Jeffs advised the Court:

Our claim for damages is predicated upon the slander of title filed by the filing of the Notice of Interest. That claim is asserted only as against Boyd Corbett and not against Keith Gurr We are claiming about

\$1,500 worth of damages against Boyd Corbett only. (emphasis supplied)

Fitzgerald asserted that the damages were attorneys' fees incurred in the "T. H. Bell Lawsuit" and "interest lost" from T. H. Bell. At page 234, Mr. Fitzgerald testified:

Q Mr. Bell was a purchaser of you of property covered by these same Notices of Interest?

A Yes.

Q And as a result of the lawsuit, did you incur expenses?

A Yes, I did.

Q What expenses did you incur as a result of that lawsuit?

A It was about \$10,000.00.

Q And what was the expenses? What were those expenses?

A They were attorney expenses and court expenses.

Q In connection with that lawsuit?

A Yes.

Q Could you tell the Court whether or not, after the Notice of Interest was filed, whether or not Mr. Bell continued to make his payments under his contract?

A No. He refused. He did make the payments, but he held the money back for a long time.

Q As a result of that, did you incur any expenses?

A Yes, I did.

Q What were those expenses?

A The loss of interest on the money that he held back.

Yet, it turned out that Mr. Fitzgerald settled the "Bell" case.

At pages 246 and 247 Mr. Fitzgerald admitted:

Q (By Mr. Brown) Mr. Fitzgerald, isn't it true that that case, if you will, with Mr. Bell, was really settled and was not ruled upon by the Court? The parties got together and settled with the exception of the interest factor, isn't that correct?

A Yes.

Q And the only thing about the interest factor, that was tendered into court for further determination, is that correct?

A Yes.

. . .

Q (By Mr. Brown) . . . Isn't it true that on the settlement, you knew exactly what you were getting out of the deal and what Mr. Bell was getting out of the deal?

A Yes. I got an attorney's bill. That's all I got out of it.

Q But you also got Mr. Bell to honor the Contract, didn't you?

A What contract did he honor?

Q The 1978 Contract.

A No. It had nothing to do with him honoring this Contract.

Q It didn't have anything to do with that Contract?

A Well, yes, the arguments was on the payments on the Contract. But he has since made the payments on the Contract, yes.

Q So he is honoring the Contract?

A Okay. Yes.

Q And in actual fact, you accepted that settlement by way of compromise with Mr. Bell, and Mr. Bell decided to take the property, subject to this so-called encumbrance of the Notice of Interest, didn't he?

A Yes, if I understand your question.
Yes. (emphasis supplied)

Mr. Fitzgerald then tried to get attorneys' fees against Mr. Corbett for the "Notices" based upon the "Bell" litigation. The "Bell" litigation was commenced in 1978, almost four years before the recordation of the "Notices of Interest." Mr. Fitzgerald, under cross-examination admitted:

Q (By Mr. Brown) Now, Mr. Fitzgerald, you were involved in litigation with Mr. Bell before that ever occurred, before the Notice of Interest was filed, weren't you?

A That's what the record shows, yes.

Q And you had litigation about other problems with him, independent of any Notice of Interest, isn't that correct?

A It could be, yes.

Q It "could be," or is?

A If the dates are right on there, it should be right, yes.

Exhibit 25 is the alleged attorneys' fees. However, Exhibit 25 points out that the "Bell-Badger" litigation was commenced long before the "Notices" were filed. The litigation had nothing to do with the alleged slander of title as a result of the "Notice." There were third party complaints, answers to third party complaints and a number of discovery requests and responses all before the filing of the "Notices." Exhibit 25 is the culmination of that litigation. The letters in Exhibit 8 all pre-date the "Notices" except for letters, nos. 5 and 6, which are dated February 1983 and February 1984, but refer back to the Badger litigation which was before the "Notices."

The trial court concluded at page 385:

THE COURT: . . . it seems that the Notices of Interest ought to be cleared from the record. I can't see that there was any damage done there. I think that you totally failed on the damage proved there. But I think that the so-called Notice of Interest is not the kind that is recognized by the law, although I don't think there was any spite motivation. I think it was--it wasn't anything that was maliciously done. A slander of title, ordinarily, or something out of spite because of some boundary problem, or something like that.

POINT V

CORBETT AND GURR ARE ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL

On appeal, the rule of law for attorneys' fees for a prevailing party, when there is no written contract for attorney fees is found in recent case law. The authority for attorney fees to be awarded against Fitzgeralds and Mr. Jeffs is found under Rule 11 of the Utah Rules of Civil Procedure, Rule 33(a) of the Rules of the Supreme Court, and the cases of O'Brien v. Rush, 744 P.2d 306 (Ut. Ct. App. 1987), Barber v. The Emporium Partnership, 750 P.2d 202 (Ut. Ct. App. 1988), Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Ut. Ct. App. 1988), Porco v. Porco, 752 P.2d 365 (Ut. Ct. App. 1988), and Brigham City v. Mantua Town, 754 P.2d 1230 (Ut. Ct. App. 1988).

Under the guidelines of Backstrom Family Ltd. Partnership, supra, this Court gave direction to Mr. Jeffs to make a decision to appeal "after careful consideration by counsel and client."

Mr. Jeffs, if he doesn't know, should have known of the scope of review before this Court. The trial court's findings of fact will not be disturbed if there is sufficient evidence in the record to substantiate the findings. This

scope of review has been succinctly stated in Power Systems and Controls v. Keith's Electrical Construction Co., 765 P.2d 5, 97 U.A.R. 34 at page 36:

The factual findings and the resulting judgment of the trier of fact are to remain undisturbed if based upon substantial, competent and admissible evidence. Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); Car Doctor, Inc. v. Belmont, 635 P.2d 82, 83-84 (Utah 1981); Wilburn v. Interstate Elec., 748 P.2d 582, 585 (Utah Ct. App. 1988). Factual findings are given considerable deference because of the trial court's ability to assess the witnesses' credibility, and will only be reversed on appeal if they are clearly erroneous. Southland Corp. v. Potter, 760 P.2d 320, 321 (Utah Ct. App. 1988).

CONCLUSION

Corbett and Gurr respectfully request this Court to affirm the trial court's decision and for attorneys' fees and costs of this appeal as provided in Rule 33(a) of the Rules of the Supreme Court.

DATED this 20 day of April 1989.

JARDINE, LINEBAUGH, BROWN & DUNN

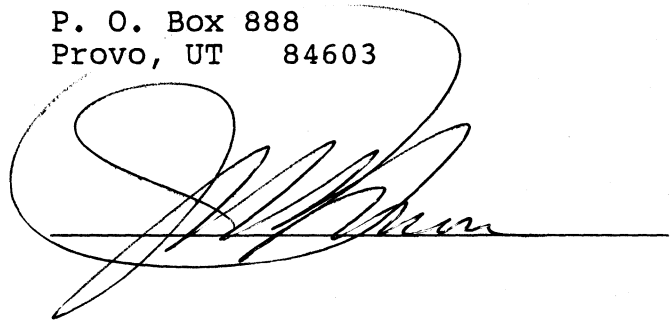
By


James R. Brown

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of April 1989,
I caused a true and correct copy of the foregoing BRIEF OF
RESPONDENTS to be mailed by United States mail, postage
prepaid, to:

M. Dayle Jeffs
Jeffs and Jeffs, P.C.
90 North 100 East
P. O. Box 888
Provo, UT 84603

A large, stylized handwritten signature in black ink, appearing to read 'M. Dayle Jeffs', is written over a horizontal line.

JRB-P2412