2009

Marlene Stone v. Richard Flint and Judy Flint : Brief of Appellee

Utah Court of Appeals

David B. Stevenson; Stevenson and Smith; Attorney for Appellant.
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'34201

IN THE UTAH COURT OF APPEALS

MARLENE STONE, Plaintiff/Appellee, vs. RICHARD FLINT and JUDY FLINT, Defendants/Appellants.	**BRIEF OF THE APPELLEE** Appellate Case No. 20090564-CA Civil No. 080907234

BRIEF OF THE APPELLEE

Appeal from Order Dismissing Respondent's Counterclaim
Second Judicial District Court, Weber County, Ogden Department, State of Utah
Michael D. Lyon, District Court Judge

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Annotated § 78A-4-103(2)(j), cases transferred to the Court of Appeals from the Supreme Court.

DETERMINATIVE STATUTES AND RULES

1. Rule 401, Utah Rules of Evidence. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

2. Rule 402, Utah Rules of Evidence. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

3. Rule 801, Utah Rules of Evidence. Definitions.

The following definitions apply under this article:

> *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> *Declarant.* A "declarant" is a person who makes a statement.
>
> *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> *Statements which are not hearsay.* A statement is not hearsay if:
> (d)(2) Admission *by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. (Amended effective October 1, 1992)

4. Rule 802, Utah Rules of Evidence. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

5. Rule 803, Utah Rules of Evidence. Hearsay exception; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. (Amended effective October 1, 1992; November 1, 2001; November 1,

2004.)

6. Rule 807, Utah Rules of Evidence. Other exceptions.

A statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Added effective November 1, 2004.)

STATEMENT OF THE CASE

NATURE OF THE CASE:

On November 13, 2008 Plaintiff, Marlene Stone, filed a Complaint seeking the eviction of Defendants, Richard Flint and Judy Flint, from 15 acres she had leased to the Defendants on April 16, 2008. The lease was for a one (1) year period and expired on April 17, 2009.

Defendants, Richard Flint and Judy Flint, filed an Answer and Counterclaim on November 21, 2008. In their Counterclaim, Defendants, Flint, allege Plaintiff, Stone, sold three (3) loafing sheds on her property to the Flints and now refuses to give them the sheds. Flints allege Marlene Stone breached a Uniform Real Estate Contract and Bill of Sale and/or converted the loafing sheds to her

benefit. A loafing shed is a portable shed, typically made of metal, that provides shelter and feed to horses that are pastured and not typically left in a barn.

On February 3, 2009 the parties entered into a Confidential General Release and Settlement Agreement which was filed with the court on February 13, 2009. The parties stipulated in the Recital of the Confidential General Release and Settlement Agreement the only remaining issues for the court are whether three (3) loafing sheds and several non-fixed mobile panels on Marlene Stone's property are part of a Bill of Sale and Real Estate Purchase Contract, both dated April 16, 2008. The parties settled the eviction action and wrongful termination of the lease and Defendants, Flints' claim for trespass and breach of the Covenant for Quiet Enjoyment before the trial.

COURSE OF THE PROCEEDINGS:

Bench trial was held on April 15, 2009 and April 20, 2009. Pursuant to the Confidential General Release and Settlement Agreement, Plaintiff, Marlene Stone, dismissed her claim for eviction as the parties agreed the lease expired on January 2, 2009. Defendants, Richard Flint and Judy Flint, abandoned their claim of trespassing and breach of Quiet Enjoyment, reserving only whether three (3) sheds and several non-fixed mobile panels on Plaintiff, Marlene Stone's property, were part of the Bill of Sale and Real Estate Purchase Contract, both dated April 16, 2008. Paragraph 3 of the Agreement states the parties agree to stipulate that the legal ownership of the sheds and non-fixed panels are the sole and remaining issues which are scheduled for trial on April 15, 2009.

DISPOSITION BY THE TRIAL COURT:

Non-jury trial was held on April 15 and April 20, 2009. The trial court issued a Memorandum Decision on April 21, 2009. The trial court ruled the Real Estate Purchase Contract (REPC) suspended all prior negotiations, representations, and understandings of the parties, pursuant to

paragraph 14 of the REPC. The trial court concluded, as a matter of law, that the REPC and Bill of Sale are both unambiguous. Defendants, Flint, were awarded all structures that exist on their two (2) acres at the time of the contract and at the closing. Plaintiff, Marlene Stone, was awarded the three (3) loafing sheds and panels on her 15 acres.

Findings of Fact and Conclusions of Law were entered on June 1, 2009 and an Order was also entered that date, dismissing Defendants, Flints' Counterclaim for breach of contract/conversion and awarded Plaintiff, Marlene Stone, her attorney fees and court costs.

STATEMENT OF RELEVANT FACTS

Plaintiff, Marlene Stone, owned a home and 17 acres of land located in Hooper, Weber County, Utah and placed it for sale after her husband died (R at 165).

The land, the home, and all the farms appraised for about $1,400,000. (R at 167)

Because the property was so expensive, Marlene Stone agreed to sell part of it so long as she could still have access to the remaining property. (R at 167)

The boundary lines to a 1-acre parcel or a 2-acre parcel had not been surveyed at the time Marlene Stone listed the property for sale as she did not want to incur the survey expense if someone purchased all 17 acres. (R at 167)

On February 1, 2008 Plaintiff, Marlene Stone, met Defendants, Richard Flint and Judy Flint, and their realtor, Joe Adair, at her home located at 6006 South 7100 West, Hooper, Utah. (R at 167-168)

On February 1, 2008 all the parties were in a bedroom of Marlene Stone's home overlooking her property and barns. Marlene Stone stated, if they wanted two (2) acres she would have to keep 60

something feet for a road to her remaining property, but the Flints would receive the house and both barns. Richard Flint asked Marlene Stone, "Is all this stuff going to stay?" (R at 168)

Marlene Stone replied, "Yes, it does." (R at 168) "Yes. I'm not going to move anything. I'm going to leave everything right where it is." (R at 170)

Joe Adair, Flints' realtor, testified, we put in the REPC the two (2) acres would be surveyed and subject to the Flints' approval. (R at 32) Addendum One (1) to the REPC provides seller to have property surveyed and four (4) corners staked to buyers' approval. Survey to be completed by Greg Hansen, with Hansen Engineering.

Joe Adair testified Hooper City approved the boundary line changes after surveying the two (2) acres to be sold to the Flints. It was not approved by Hooper City until right before closing. (R at 33) The two acres surveyed provided for a 66-foot right-of-way to Marlene Stone on the north side of the Flints' property. (R at 28, 171) Marlene Stone testified, she knew if she did not sell all the property (17 acres) she would have to survey the property to establish a right-of-way or road to her remaining 15 acres east of the Flints' two (2) acres of property. (R at 172)

Marlene Stone testified she did not intend to sell the loafing sheds on her 15 acres to Richard Flint and Judy Flint at the time she signed the REPC. (R at 175)

Marlene Stone leased to the Flints her 15 acres for 10 months on the same day of the real estate closing. (R at 175)

Marlene Stone allowed the Flints to use the loafing sheds on her 15 acres for the 10 months the 15 acres were leased to them. (R at 174) Marlene Stone testified she did not want to move any loafing sheds off the property the Flints purchased or off the property she kept. (R at 174)

After the survey was made and the 2 acres sold to the Flints, Marlene Stone had three (3) loafing sheds on her property and the Flints had three (3) loafing sheds on their two (2) acres, together with the home and two (2) barns. (R at 175)

Richard Flint testified that Marlene Stone did not indicate to him he was entitled to any personal property on her 15 acres. (R at 118)

The panels, gates, and loafing sheds the Flints possessed were on their 2 acres and the panels, gates, and loafing sheds Marlene Stone possessed were all on her 15 acres. (R at 118-120)

Judy Flint testified on February 1, 2008 she had no idea what land actually made up the 2 acres. She and her husband wanted the 2 acres to include the house, horse barn, and hay barn and wrote up the REPC that way. (R at 154)

Judy Flint testified, once the 66-foot right-of-way was established and their 2 acres staked out by Hansen surveyors, she did not ever personally have a conversation with Marlene Stone about what personal property went with their land. (R at 155)

As to the horse walker, Judy Flint testified the main body of the horse walker was on Marlene Stone's property but the arms of it extended over onto the Flints' 2 acres so when the horses were being exercised, they would walk on the Stone property and the Flint property. Marlene Stone wanted the entire horse walker moved onto the Flints' property so that a fence could be erected between the properties. (R at 156)

Richard Flint testified, after February 1, 2008 he did not discuss with Marlene Stone about the loafing sheds and panels that would remain on her property. (R at 114) The subject was not discussed.

Richard Flint testified the loafing sheds and panels were not moved after the Flints purchased

their 2 acres in April, 2008. (R at 114) Everything remained exactly the same. (R at 114) Marlene Stone had three (3) loafing sheds on her property and the Flints had three (3) loafing sheds on their 2 acres. (R at 115-116)

Richard Flint testified, the panels and gates he possesses are all on his 2 acres and the panels and gates Marlene Stone possesses are all on her 15 acres. (R at 118-119) He does not claim she took his personal property and put them on her property. (R at 118-119)

As to the horse walker, Richard Flint testified the base, a large cement slab, was on Marlene Stone's property and the arms extended over onto the Flints' property so that horses being exercised would walk on both properties. (R at 125-131) In paragraph 9 of the Confidential General Release and Settlement Agreement, the parties stipulate, pursuant to the April 16, 2008 Real Estate Purchase Contract and accompanying Bill of Sale, the horse walker was to be the property of the Flints and would be moved onto their property by January 30, 2009 as set forth in paragraph 10.

Defendant, Richard Flint, specifically identified the location of all the loafing sheds, hay barn, and horse barn on Plaintiff's exhibit 1, a map of the Plaintiff's property and Defendants' two (2) acres. (R at 31-32, 58) Structure A, B, and E are loafing sheds on Marlene Stone's 66-foot right-of-way. (R at 58) Structure D is a loafing shed on the Flints' two (2) acres. (R at 31-32, 58) Structure E is a pigeon pen and loafing shed on Marlene Stone's property. (R at 58) Structure F is a loafing shed on the Flints' property. Structure G is a five-stall horse barn on the Flints' property. (R at 58) Structure H is a hay barn on the Flints' property. (R at 58) Structure I is a loafing shed on the Flints' property. (R at 58)

Structures A, B, and E are loafing sheds on Marlene Stone's 66-foot right-of-way and are the disputed three (3) loafing sheds in this lawsuit. (R at 67) Richard Flint testified, he thought the three

(3) loafing sheds; A, B, and E, located on Marlene Stone's property, belonged to him. (R at 74)

The Bill of Sale was prepared by the title company at the time of closing, on April 16, 2008, and was drafted consistent with the REPC and addendums thereto. (R at 32, 46) The Bill of Sale states, Marlene Stone sold the buyers, Richard Flint and Judy Flint, certain personal property now at 6006 South 7100 West, Hooper, Utah; particularly described as all lounging and loafing sheds, panels, gates, fences, waterers, and horse walker as presently exist.

Marlene Stone testified, she use to live at 6006 South 7100 West, Hooper, Utah before she sold that property to the Flints. (R at 165) The address given by Hooper City for her remaining 15 acres is 5990 South 7100 West, Hooper, Utah. (R at 165)

During the trial, Marlene Stone's attorney objected to the testimony of Jeffrey D. Harris concerning a conversation between Marlene Stone and Jeffrey Harris about what personal property was included in the two (2) acres Jeffrey Harris was once considering buying from Marlene Stone. (R at 133) Plaintiff's counsel objected on the grounds of hearsay (R at 133) and relevance. (R at 136) The trial court sustained the objection on the grounds of relevance. (R at 136)

SUMMARY OF ARGUMENT

A bench trial was held on Richard and Judy Flint's Counterclaim for breach of contract and conversion of personal property, to-wit: three (3) loafing sheds and some non-fixed mobile panels. Buyers, Richard and Judy Flint, and Seller, Marlene Stone, signed a Real Estate Purchase Contract (REPC) on February 1, 2008 wherein a home located at 6006 South 7100 West, Hooper, Weber County, Utah; together with two (2) acres of land with a horse barn and hay barn were sold to the Flints by Marlene Stone.

Clause 1.1 of the REPC included fixtures and personal property if presently owned and attached to the property. This clause also states the following items should also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: oven/range, refrigerator, window coverings as presently exist.

Later the same day, Addendum No. One to the REPC was also signed by the parties incorporating, as part of the REPC: Included items: "all lounging/loafing sheds, panels, gates, feeders/waterers and horse walker as presently exist. Seller to have property surveyed and four (4) corners staked to buyers' approval."

The home is described as being located at 6006 South 7100 West, Hooper, Weber County, Utah. The two (2) acres were to be surveyed and staked at a later time to be approved by the buyers with the provision the horse barn and hay barn were included. The personal property was to be described and conveyed under a separate Bill of Sale with warranties as to the title.

The two (2) acres were surveyed later and approved by the buyers prior to the closing on April 16, 2008. The home located at 6006 South 7100 West, Hooper, Utah and the two (2) acres, including the horse barn and hay barn, were conveyed to the buyers by means of a warranty deed. The personal property was described and conveyed to the buyer by a Bill of Sale with warranties also at closing on April 16, 2008.

The Bill of Sale, dated April 16, 2008, conveys to the buyers that certain personal property located now at 6006 South 7100 West, Hooper, Utah 84315 as follows: oven/range, refrigerator, window coverings, two (2) water irrigation sheds, all lounging and loafing sheds, panels, gates, feeders, waterers, and horse walker as presently exist.

Seller, Marlene Stone, was assigned by Hooper City the address of 5990 South 7100 West,

Hooper, Utah for her remaining 15 acres of property not sold to the Flints.

Prior to trial on April 15, and April 20, 2009, the parties signed a Confidential General Release and Settlement Agreement on February 2 and February 3, 2009 and filed it with the court. The parties stipulated the only remaining issues for the court are whether three (3) sheds and several non-fixed mobile panels on seller, Marlene Stone's property are part of a Bill of Sale and Real Estate Purchase Contract, both dated April 16, 2008.

Clause 9 of the Confidential General Release states, it is acknowledged by the parties there is a horse walker that is located on the Stone's real property, but which is the property of the Flints, pursuant to an April 16, 2008 Real Estate Purchase Contract and accompanying Bill of Sale, of the same date of this statement, and is in no way an admission conveying the rightful ownership of the loafing sheds or any remaining property on the Stone's land and which the Flints claim an interest in by virtue of said contracts.

Clause 10 states, the Flints agree to remove the horse walker by January 30, 2009 onto their two (2) acres.

The trial court correctly ruled that clause 1.1 of the REPC is not ambiguous and cannot be read to include any items of personal property not presently owned and attached to the property located at 6006 South 7100 West, Hooper, Utah. Accordingly, the three (3) loafing sheds and panels located on Marlene Stone's remaining 15 acres were not conveyed to the buyers, Richard and Judy Flint.

Moreover, the Bill of Sale, which in the final, integrated explanation of the parties' intent, transferred only that certain personal property now at 6006 South 7100 West, Hooper, Utah.

Consequently, the Flints are only entitled to receive three (3) loafing sheds and the panels on their two (2) acres located at 6006 South 7100 West, Hooper, Utah and not those located on Marlene Stone's remaining 15 acres. The Bill of Sale is not ambiguous and can only be interpreted to convey the personal property located on the Flints' two (2) acres at the time the Bill of Sale was signed on April 16, 2008.

The trial court correctly excluded the testimony of witness, Jeffrey Dean Harris, on grounds of relevancy. The proffered testimony of Jeffery Harris as to his conversation with seller, Marlene Stone, concerning his inquiry to purchase two acres and some personal property on a different day, time, and location was properly excluded based upon Marlene Stone's counsel's objection as to hearsay and relevancy.

The trial court did not err in excluding and misstating certain alleged salient facts from its Findings of Fact. Flints argue because seller, Marlene Stone, did not dispute the Flints' right to the horse walker, feeder, and waterers at trial; that their extrinsic facts are important for the Court to determine whether the REPC and Bill of Sale are ambiguous. The only trial issues were stipulated to be awarding of three (3) loafing sheds and various panels located on Marlene Stones' property. The ownership of the horse walker was stipulated to in the Confidential General Release and the issue of ownership of feeders and walkers was stipulated not to be a trial issue.

Seller, Marlene Stone, should be awarded her attorney fees on appeal based upon the REPC and terms of the Confidential General Release, considering she was awarded her costs and attorney fees at trial.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT NEITHER THE REAL ESTATE PURCHASE CONTRACT NOR THE BILL OF SALE ARE AMBIGUOUS.

The trial court correctly ruled neither the Real Estate Purchase Contract (REPC) nor the Bill of Sale, dated April 16, 2008, are ambiguous thereby permitting the trial court to interpret the contracts as a matter of law.

"The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract." *WebBank v. American Gen. Annuity Svc. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139.

> 1139. When interpreting a contract, "we look to the writing itself to ascertain the parties' intentions, and we consider each contract provision...in relation to all of the others, with a view toward giving effect to all and ignoring none." "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Green River Canal Co. v. Thayn* 2003 UT 42, 84 P. 3d 1134,1141 (Utah 2003).
>
> [5] ¶ 25 A contractual term or provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.' " *Daines v. Vincent* 2008 UT 51, 190 P.3d 1269, 1275 (Utah 2008).
>
> Contractual ambiguity can occur in two different contexts: (1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties. 907 p.2d at 268. The first context presents a question of law to be determined by the judge. *WebBank*, 2002 UT 88, ¶ 22, 54 P.3d 1139. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, "parol evidence of the parties' intentions should be admitted." *Id. at 1275-1276.*

In Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 the Supreme Court of Utah set forth a two-part standard for determining facial ambiguity. First, we indicated that "[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the 'extrinsic evidence of the judge's own linguistic education and experience.' " Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that "the interpretations contended for are reasonably supported by the language of the contract."

In Daines v. Vincent, *id.* at 1276, the Supreme Court of Utah held: In articulating the *Ward* rule, we sough to establish a balanced, "better-reasoned" approach to an analysis of facial ambiguity that would allow judges to "consider the writing in the light of the surrounding circumstances." *Id.* However, we did not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit. In other words, our statement that "[r]ational interpretation requires at least a preliminary consideration of all credible evidence," does not create a preference for that evidence over the language of the contract. Thus, under *Ward*, a finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when "reasonably supported by the language of the contract." *Ward*, 907 P.2d at 268.

The principles of *Ward*, *id.*, were succinctly set forth in *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 629 Utah Adv. Rep. 21, 22-23 as follows: Under well-accepted rules of contract interpretation, we look to the language of the contract to determine its meaning and the intent of the contracting parties. We also "consider each contract provision...in relation to all of the others, with a view toward giving effect to all and ignoring none." Where "the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the

plain meaning of the contractual language, and the contract may be interpreted as a matter of law." Only if the language of the contract is ambiguous will we consider extrinsic evidence of the parties' intent. We have explained that "ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." Additionally, "[u]nder the well-established rule of construction *ejusdem generis*," we determine the meaning of a general contractual term based on the specific enumerations that surround that term.

The trial court found the present case to be factually similar to *Flores v. Earnshaw*, 2009 UT 90, 627 Utah Adv. Rep 13. In *Flores*, the parties disagreed if personal property, as enumerated in Clause 1.1 of the REPC, was indicated in the sale. The Utah Court of Appeals held Clause 1.1 was not ambiguous as the personal property was included in the sale if presently owned and attached to the property. The Court of Appeals ruled the personal property was not included in the sale because the personal property was not "presently owned and attached to the property" because the condominium was yet to be built.

In the present case, the trial court ruled the three (3) loafing sheds and panels the Flints sought were not "presently owned and attached" to the two (2) acres the Flints purchased from Marlene Stone. It is undisputed, as demonstrated by Plaintiff's exhibit 1, the loafing sheds labeled A, B, and E, nor the panels, are "presently owned and attached to the property" purchased by the Flints. The trial court further ruled, the Bill of Sale, which is the final, integrated expression of the parties' intent, only transferred those items of personal property "now at 6006 South 7100 West, Hooper, Utah." The trial court ruled the three (3) loafing sheds and panels located on the Flints' two (2) acres, were awarded to them but the three (3) loafing sheds and

panels located on Marlene Stone's remaining 15 acres located at 5990 South 7100 West, Hooper, Utah, remained her property.

II. THE TRIAL COURT DID NOT ERR IN SUSTAINING PLAINTIFF'S OBJECTION TO DEFENDANT'S WITNESS'S TESTIMONY ON GROUNDS OF HEARSAY AND RELEVANCE.

Counsel for the Flints called Jeffrey Dean Harris as a witness to testify concerning a meeting he had with Marlene Stone to discuss possible purchase of two (2) acres and some personal property to be included in the sale. Counsel for Marlene Stone objected to the testimony of the witness when asked what did Marlene Stone state, "was the personal property that was included with that purchase." (R at 133)

The trial court ruled it was clearly hearsay (R at 135) and requested counsel for the Flints to point to an exception to the hearsay rule that would allow the testimony to come in. (R at 135) Counsel for the Flints cited Rule 803(3), Utah Rules of Evidence, the existing mental state of mind of the declarant, (Marlene Stone).

Counsel for Marlene Stone then objected on the grounds of relevance as the conversation with the witness, Jeffrey Harris, occurred on a different day, different time, and it is not material nor relevant to the Flints' case. The Court sustained that objection. (R at 136)

Testimony by the witness about what Marlene Stone may have said on a different occasion and date is clearly hearsay and not relevant to the case between the Flints and Marlene Stone. Evidence which is not relevant is not admissible, pursuant to Rule 402, Utah Rules of Evidence, and the testimony of the witness was clearly hearsay. Defendants, Flints' witness's testimony was correctly excluded by the trial court.

III. THE TRIAL COURT DID NOT ERR IN EXCLUDING AND ALLEGEDLY MISSTATING SALIENT FACTS FROM ITS FINDINGS OF FACT

Counsel for the Flints argues that paragraphs 12 and 13 of the Findings of Fact refer only to three (3) lounging/loading sheds, and some mobile gates and panels on Marlene Stone's property being in dispute in the suit. The only possible reference to structures in Findings of Fact 13 was the last sentence that the parties had no further discussion regarding the structures as they may lie inside and outside the two (2) acres.

The Flints argue it is important that they allegedly took possession of all the feeders, waterers, and horse walker located on Marlene Stone's property and the Court failed to include those facts in its Findings. However, the parties stipulated the only trial issues were ownership of the lounging/loafing sheds and the non-fixed mobile panels. The parties stipulated, in their Confidential General Release, those were the only two issues and that the horse walker was the property of the Flints and included in the Bill of Sale. The location and ownership of the feeders and waterers was irrelevant at the time of trial and was not contested by either party. The parties and the trial court are bound by the agreement of the parties as to what issues were contested and to be decided by the trial court.

CONCLUSION AND REQUEST FOR RELIEF

The trial court's determination that the Real Estate Purchase Contract and the Bill of Sale are not ambiguous should be affirmed. The trial court's interpretation that the loafing/lounging sheds and mobile panels were not "presently attached" to the property purchased by the Flints nor were these items of personal property, "now at 6006 South 7100 West, Hooper, Utah" at the time

the parties signed the REPC and Bill of Sale, should also be affirmed.

Plaintiff, Marlene Stone, should be awarded her attorney fees and costs on appeal, pursuant to Clause 17 of the REPC and also Clause 17 of the Confidential General Release and Settlement Agreement.

Respectfully submitted this _____ day of January, 2010.

NEELEY & NEELEY

_____
ROBERT L. NEELEY
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

In accordance with Utah Rules of Appellate Procedure 26(b), I hereby certify that on the _____ day of January, 2010 two (2) true and correct copies of the foregoing Brief of the Appellee were served by U.S. mail, postage prepaid, to David B. Stevenson, attorney for Defendant/Appellant, at the following address:

David B. Stevenson
STEVENSON & SMITH, P.C.
3986 Washington Blvd.
Ogden, Utah 84403

_____
SECRETARY

ADDENDUMS

A. Real Estate Purchase Contract

B. Bill of Sale

C. Confidential General Release and Settlement Agreement

D. Plaintiff's Exhibit P1, map of property

E. Memorandum Decision

F. Findings of Fact and Conclusions of Law

G. Order Dismissing Respondent's Counterclaim

H. Rule 401, Utah Rules of Evidence

I. Rule 402, Utah Rules of Evidence

J. Rule 801, Utah Rules of Evidence

K. Rule 802, Utah Rules of Evidence

L. Rule 803, Utah Rules of Evidence

M. Rule 807, Utah Rules of Evidence