

1980

# Paul M. Gardner v. Shannadean Dipo Christensen : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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Paul M. Gardner,	)	
Plaintiff and Appellant,	)	
vs.	)	NO. 16615
Shannadean Dipo Christensen	)	
Defendant and Respondent.	)	

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APPELLANT'S BRIEF

---

Appeal from the Judgment of the Third Judicial District Court  
for Salt Lake County, State of Utah  
HON. Earnest L. Baldwin, Judge

---

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IN THE SUPREME COURT  
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Paul M. Gardner )  
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vs. ) NO. 16615  
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Defendant and Respondent. )

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APPELLANT'S BRIEF

---

STATEMENT OF THE NATURE OF THE CASE

This is an action for recovery of damages arising out of Defendant's breach of an Option agreement for real property.

DISPOSITION IN LOWER COURT

This action was filed by Plaintiff on December 15, 1977 to recover damages from Defendant for the breach of an Option agreement or in the alternative to compel Defendant to perform and convey title to the subject real property under the terms of an Option agreement entered into between one, Michael Heyrend, and the Defendant on May 18, 1977 which Option was subsequently assigned to Plaintiff and duly exercised by him on October 18, 1977. On February 2, 1978 Plaintiff made a motion for permission to amend Plaintiff's complaint to delete its alternative claim for specific performance and for partial summary judgment

on the issue of liability. On March 16, 1978 the Honorable David K. Winder, Third District Court Judge, granted Plaintiff's motion to amend Plaintiff's complaint and for partial summary judgment that Defendant had in fact breached the Option agreement and was liable to Plaintiff for all damages suffered by Plaintiff arising out of said breach. On March 27, 1979, the damage issue was tried to the Court, the Honorable Earnest L. Baldwin, Third District Court Judge presiding, and judgment was granted for the Plaintiff in the amount of \$2,000.00, the amount which had been paid as consideration for the Option and which was to apply as a credit against the purchase price of the real property, and for interest at six percent and costs incurred by Plaintiff, but excluding all special damages incurred by Plaintiff as costs and expenses in preparation for exercise of the Option and excluding attorney's fees incurred by Plaintiff which were provided for under the terms of the Option agreement. From the judgment in favor of the Plaintiff on the issue of damages the Plaintiff appeals.

#### RELIEF SOUGHT ON APPEAL

The Plaintiff seeks reversal of the judgment on damages and judgment in favor of Plaintiff increasing the award of damages as a matter of law, or that failing, a new trial on the issue of damages.

#### STATEMENT OF FACTS

##### The Option

A written Option agreement was entered into between, one Michael Heyrend, and the Defendant on May 13, 1977 for the pur

chase of certain real property consisting of 2.63 acres of unimproved land located in Salt Lake County, State of Utah. The Option agreement provided for the payment of the purchase price for the subject real property if exercised in the cash sum of \$80,000.00 and at the time the Option was obtained, \$1,000.00 was paid as consideration for the Option, which amount was to be applied to the purchase price if the Option was exercised. The Option was granted for a three month period and could be extended for an additional two month period upon payment of an additional \$1,000.00 in consideration. The Option was subsequently extended two months to and including October 18, 1977 and an additional \$1,000.00 of consideration was paid to extend the Option. This additional consideration also applied to the purchase price so that after applying the \$2,000.00 paid for the Option, the remaining balance was \$78,000.00, (R.5,6; Findings R.103,104).

#### Negotiations Prior to the Option

The negotiations between Mr. Heyrend and Defendant for the Option agreement were conducted by one, David Helm, who was Mr. Heyrend's agent and who negotiated the relevant real property agreements on behalf of Mr. Heyrend. Prior to the date of execution of the Option agreement, Mr. Helm, on behalf of Mr. Heyrend, entered into negotiations with the Defendant and specifically advised the Defendant that Mr. Heyrend was interested in acquiring the Defendant's property in conjunction with an adjacent parcel of property owned by Mr. and Mrs. DeGooyer (hereinafter "DeGooyer's property"). Mr. Helm, further advised



Defendant that the DeGooyer's property was necessary for access to Defendant's property and it was Mr. Heyrends intention to develop multiple family residences on the Defendant's property and the DeGooyer's property combined (Findings R.104).

During the negotiations, Mr. Helm first proposed to the Defendant that the Defendant enter into a sales agreement with Mr. Heyrend subject to the condition precedent that Mr. Heyrend be able to enter into a purchase agreement for the DeGooyer's property and further subject to the condition precedent that approval from Salt Lake County be obtained for the development of multiple family residences on the two properties combined. Defendant requested, however, that Mr. Heyrend first enter into an agreement to purchase the DeGooyer's property and then contact Defendant again concerning the purchase of Defendant's property (Findings R.104).

On May 11, 1977, shortly after the initial negotiations with Defendant, Mr. Heyrend entered into a written agreement to purchase the DeGooyer's property for the sum of \$53,000.00, subject to the express condition precedent that Mr. Heyrend be able to enter into a purchase agreement for the Defendant's property (Findings R.104).

On May 13, 1977, shortly after Mr. Heyrend had entered into the agreement to purchase the DeGooyer's property, Mr. Helm again contacted the Defendant and met with the Defendant and her attorney and advised them that Mr. Heyrend had entered into an agreement to purchase the DeGooyer's property and that it was conditioned upon Mr. Heyrends being able to enter into an agree-

ment to purchase Defendant's property. He also discussed the proposed development on the two properties and said he would keep Defendant advised on the progress in obtaining Salt Lake County approval. The Defendant's attorney thereupon prepared the Option agreement and Defendant executed it (Findings R.105; R.146-148).

During the Option Period

On August 3, 1977, prior to the date the Option had to be exercised, Mr. Heyrend entered into an agreement to sell the DeGooyer's property and the Defendant's property and one additional parcel of real property (a parcel adjoining the Defendant's property which Mr. Heyrend had entered into an agreement to purchase) to Probe Construction Company, a Utah Corporation of which Plaintiff was the President and sole shareholder (Findings R.105).

During the Option period, Mr. Heyrend caused to be prepared a site plan for the proposed development of the two properties with the necessary access for thirteen duplexes on Defendant's property being provided over the DeGooyer's property. The site plan illustrated that the properties were combined and treated as being under common ownership. Certain expenses were paid for the engineering and preparation of the site plan in the amount of \$415.54 (Findings R.105).

During the period of the Option, Mr. Helm contacted Defendant on many occasions and advised Defendant of the progress on the approval from Salt Lake County for the planned development. Approval from Salt Lake County was obtained for the planned development and Mr. Helm met with Defendant during the Option

period and so advised her and showed her the site plan illustrating the location of the office building proposed to be constructed on the DeGooyer's property and the thirteen duplexes proposed to be constructed on the Defendant's property. (Findings R.105, 106).

On September 28, 1977, prior to the date the Option with Defendant was required to be exercised, Mr. Heyrend, relying upon the Option, entered into a new written agreement to purchase the DeGooyer's property which agreement was not subject to the condition precedent that Mr. Heyrend be able to purchase the Defendant's property and Mr. Heyrend paid a cash deposit as earnest money in the sum of \$300.00. The closing date specified in the new agreement for the DeGooyer's property was October 27, 1977 which date was after the date Plaintiff gave notice to Defendant that he was exercising the Option and that he had acquired all of Mr. Heyrends interest in the Option (Findings R.106).

On October 14, 1977, Mr. Heyrend agreed with Plaintiff that Plaintiff's company, Probe Inc., could assume Mr. Heyrends rights and interests in the purchase agreement for the DeGooyer's property and in the Option for the Defendant's property to satisfy Mr. Heyrends obligation to sell those parcels of real property to Plaintiff's company under the written agreement made on August 3, 1977. Mr. Heyrend also orally assigned all of his rights and interests in the contracts to purchase and on the same date executed a written assignment of the Option for the purpose of permitting the Plaintiff to exercise the Option directly (Findings R.106).

In addition to the special expenses paid for engineering and site plan preparation for the Defendant's property and the DeGooyer's property combined, the Plaintiff also had an existing duplex plan and office building plan which had to be revised to satisfy the requirements of Salt Lake County's approval for the development. The Plaintiff paid \$400.00 for the modification of the existing building plans. The modified plans were also used by Plaintiff to obtain a commitment for financing for the proposed development (R.180,182,183).

#### Experts' Valuation of Property

Expert testimony was admitted at trial to determine the fair market value of the Defendant's property upon the date Defendant breached the Option agreement, October 18, 1977. Experts for Plaintiff, testified that the value of Defendant's property was \$114,600.00 if the Defendant's property was considered with the benefit of the access to Defendant's property over the adjoining DeGooyer's property under circumstances where the two properties were being acquired together, were under common ownership, or were being used in combination (the Court so found-Findings R.107; R.214,215,224,225). Plaintiff's expert testified that the value of Defendant's property was \$81,339.00, when Defendant's property was considered without the benefit of the access over the DeGooyer's property (R.224).

Plaintiff's experts testified that the lower value of Defendant's property when considered without any combination with the DeGooyer's property resulted from the absence of a sufficient access to the Defendant's property which did not front upon a public street. When the DeGooyer's property is acquired

together with the Defendant's property, the DeGooyer's property serves as that principal access and therefore the value of Defendant's property is greatly enhanced by the combination of the two properties (R.215,216,225).

Expert testimony for Defendant was that the value of the Defendant's property on the date of breach was \$80,000.00 when considering the property without the benefit of any combination or joint acquisition of the Defendant's property with the DeGooyer's property (the Court so found-Findings R.107). Defendant's expert also testified that the detriment to Defendant's property when considered alone, was that it did not have a sufficient access to it, and that the highest and best use for Defendant's property would be in combination with other properties so there would be a principal access and a combination or joint acquisition of the Defendant's property with the DeGooyer's property would make the value of the Defendant's property substantially more (R.235,236).

Upon receiving Defendant's experts testimony, the Court commented that the whole issue in the case would be based on the question of what was the appropriate measure of damages (R.235). The Court in its Conclusions of Law determined that the appropriate measure of damages was the value of the Defendant's property without considering any benefit from the access obtained by combination or joint acquisition with the DeGooyer's property viz, \$80,000.00 (the Option price), less the unpaid balance of \$78,000.00 for damages in the amount of \$2,000.00, the consideration which was paid to Defendant for the Option and which was

to be applied to the purchase price if the Option was exercised (Conclusions-R.107).

The Court further concluded Plaintiff was not entitled to recover the costs and expenses of engineering and preparation of a site plan for the proposed development since the loss of said costs and expenses did not directly result from Defendants breach (Conclusions-R.107).

The Court also said in its Conclusions of Law that Plaintiff was entitled to recover, as part of the damages, attorney's fees under the written terms of the Option agreement, but evidence of attorney's fees was not presented at trial and Plaintiff's motion made at the beginning of Plaintiff's closing argument to permit Plaintiff to offer evidence of attorney's fees was denied and therefore, the Court awarded no attorney's fees (Conclusions-R.108).

#### ARGUMENT

##### Point I

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES MEASURED BY THE FAIR MARKET VALUE OF THE DEFENDANT'S PROPERTY UPON THE DATE OF BREACH LESS THE UNPAID BALANCE OF THE CONTRACT PRICE AND WITH THE FAIR MARKET VALUE OF DEFENDANT'S PROPERTY DETERMINED BY CONSIDERING THE BENEFIT OF THE JOINT ACQUISITION OR COMBINATION OF THE DEGOOYER'S PROPERTY AND THE DEFENDANT'S PROPERTY.

Under Utah Law, the basic measure of damages for breach of an agreement to sell real property is the benefit of the bargain rule from ordinary contract law as stated in Beckstrom v. Beckstrom, 578 P.2d 520 (Ut. 1978):

"The general rule as to damages in such circumstances is that where a vendor breaches his contract

to convey property, the vendee is entitled to the benefit of his bargain; that is, he is entitled to the market value of the property at the time he would be entitled to receive conveyance thereof, less the amount he agreed to pay." 578 P.2d at P.523.

To the same effect are Smith v. Warr, 564 P.2d 771 (Ut. 1977); Bunnell v. Bills, 368 P.2d 597 (Ut. 1962).

It is important to note that this general rule of damages for a vendors breach, i.e., the excess of fair market value over the balance of the purchase price, was not adopted to limit the vendee to less than the benefit of his bargain, but instead is expected to be the benefit of the vendee's bargain under usual circumstances. The Utah Supreme Court has emphasized time and time again, that it is the loss of the benefit of the bargain to the vendee that the Court is attempting to measure and not mere rigid compliance with a formula that does not apply in all circumstances. Indeed in Beckstrom where Laub, the vendee, had bargained to purchase 80 acres of real property from Vere, who owned only a one-half interest in the property, the Court allowed Laub to retain forty acres, but reversed on the damages awarded which were in part based only on Laub's loss of his bargain on one-half of the property, the forty acres which Vere could not convey to him. The Court said;

In view of our decision as set forth herein, that the Laubs are entitled to the benefit of their bargain as it would have been if Vere had performed on his contract, it is necessary that there be such a determination and assessment of damages under the rule above stated. 578 P.2d 520 at P.523.

It appears that the Supreme Courts intention in Beckstrom was that Laub should receive damages for the entire benefit of his bargain which would be the value of the full 80 acres



combined and not merely the loss of the value of the 40 acres he did not receive. Justice Ellett concurring in the unanimous opinion in Beckstrom commented as follows:

I concur, but wish to state my opinion as to what the damages for the Laubs would be on retrial.

I think the Laubs are entitled to the fair market value of the entire tract of land less the fair market value of the one-half interest awarded to them; also, less the \$15,000 unpaid on the purchase contract. 578 P.2d 520 at P.524.

In this case the Plaintiff bargained for, and his direct purpose was, the joint acquisition of both the DeGooyer's property and the Defendant's property for the enhanced benefit of their combination by providing the necessary access to Defendant's property and for the specific purpose of an integrated development on both properties. In the initial negotiations, Defendant was specifically advised of these facts, and understood these circumstances both before and after the purchase agreement was entered into for the adjoining DeGooyer's property (which was conditioned upon the purchase of Defendant's property). Only then was the Option agreement entered into with Defendant who was well informed and advised thereafter of every step taken and the benefit sought to be obtained.

Under these special circumstances for the Court to disregard the benefit of Plaintiff's bargain by merely awarding Plaintiff damages based on the fair market value of the Defendant's sole property, without the benefit of the joint acquisition and combination known to Defendant prior to entering into the Option agreement, would be depriving Plaintiff of a substantial portion of the benefit of his bargain and would not be consistent with the measure of damages expressed by the



benefit of the bargain rule.

The benefit of the bargain rule which undertakes to put the vendee in as good a position as he would have been in, had there been no breach by the vendor is not without limitation. It is generally held that the vendor should not be required to pay damages based upon special benefits or circumstances known only to the vendee, and which would not be within the reasonable contemplation of the parties. However, it is also well settled that where special circumstances cause additional damage to the innocent party, the breaching party will be held responsible for such damages if he was informed of such special circumstances prior to the time the agreement was entered into so that it can be said that the possibility of such damages were within the contemplation of the parties at the time of contract.

In Pacific Coast Title Ins. Co. v. Hartford Acc. & Indemnity Co., 325 P.2d 906 (Ut. 1958), the Utah Supreme Court stated:

The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable foreseeability that loss of such general character would result from the breach. Therefore, to be compensable, the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had adverted to breach when the contract was made, loss of such character would have been within their contemplation. 325 P.2d 906 at P.907:

And in 22 Am. Jur. 62 at P.93, the authors state:

Loss of profits growing out of an existing collateral or subordinate agreement may be recovered where, and only where, the possibility of profits was within the contemplation of the defaulting party when the original contract was made and such profits are proved with reasonable certainty.

The Utah Supreme Court in a recent case involving the breach of a real estate option reiterated the above rules on measuring damages in distinguishing between general and special damages, Ranch Homes, Inc. v. Greater Park City Corp. 592 P.2d 620 (Ut. 1979).

It is important to point out that the Plaintiff did not seek damages in the trial court measured by the loss of fair market value on the two parcels of property being treated as one, i.e., the DeGooyer's property and the Defendant's property, but instead sought only to have the damages measured by the fair market value of the Defendant's property without the detriment of inadequate access, or alternatively with the augmented or enhanced value to the Defendant's property by virtue of the Plaintiff's right to acquire the adjoining DeGooyer's property and use it to provide the necessary access. It was this benefit in combining the DeGooyer's property and the Defendant's property which the Plaintiff sought to have and which formed the very basis for the negotiations with the Defendant for the acquisition of Defendant's property and which benefit was specifically pointed out to the Defendant in a very direct and above-board manner during the negotiations prior to entering into the Option agreement. Therefore, the measure of damages advocated by Plaintiff falls more squarely within the general rule of damages than in the category of special damages although the result would be the same.

The real estate experts all testified at trial that the highest and best use of the Defendant's property (indeed per-

haps the only valuable use of Defendant's property), would be in conjunction with an adjoining property to provide appropriate access for the use and development of Defendant's property. The Utah Supreme Court has said in determining the fair market value of real property, that the Court should look to the highest and best use of the land, not the use being made of the land at the time of breach. Moyle v. S.L.C. 176 P.2d 882 (Ut. 1947); and the Court should take into consideration all factors bearing upon the value of the property which a reasonable prudent purchaser would consider, including any potential development reasonably to be expected. State Road Comm. v. Woolley, 390 P.2d 860 (Ut. 1964); State Road Comm. v. Wood, 452 P.2d 872 (Ut. 1969).<sup>1</sup>

There can be little doubt that the Defendant's property had a higher value when purchased with the DeGooyer's property to provide for the necessary access to the Defendant's property. The Defendant knew that the highest and best use of Defendant's property was in conjunction with the DeGooyer's property since Defendant attempted to purchase the DeGooyer's property by making a written offer to the DeGooyers shortly after the date the Defendant breached the Option agreement (R.207,208). Therefore, in determining the value of Defendant's property for purposes of measuring the loss of Plaintiff's bargain, the value should be viewed from Plaintiff's position

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<sup>1</sup>Although most cases discussing how to value land are condemnation cases, the principles developed in condemnation cases are applicable in determining the value in breach of contract actions. Reed v. Wadsworth, 553 P.2d 1024 (Wyo. 1976).

in having existing contract rights to acquire the DeGooyer's property. This principal is set forth at 27 Am. Jur. 2d § 280:

The fact that the most profitable use can be made only in connection with other lands does not necessarily exclude it from consideration, if the possibility of such connection is reasonably sufficient to affect market value. 27 Am. Jur. 2d § 230 at P.72.

This principal was applied in United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951), a condemnation case, where the Defendant landowner in addition to owning the condemned land also held a grazing permit on adjacent Federal land. The Court held it was proper to take the value of the grazing permit into account in determining the market value of the condemned land under its highest and best use, i.e., a ranch. Also in United States v. Fuller, 409 U.S. 488, 35 L.Ed. 2d 16, 93 S.Ct. 801 (1973), the Supreme Court stated:

This court has held that generally the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the interest.

To the same effect, see State Highway Comm. v. Bloom, 94 N.W. 2d 572 (1958); Tucson Title Ins. Co. v. State Ex Rel Herman, 489 P.2d 299 (Ariz. 1971).

In this case at the very outset of negotiations with Defendant for the purchase of Defendant's property the Defendant was specifically advised that the intended use to be made of Defendant's property was for multiple family dwellings and that the only way that use and benefit could be realized was by purchasing the adjoining DeGooyer's property along with Defendant's property so access could be provided. The highest

and best use of Defendant's property was in this combination. Defendant was first approached about entering into a purchase agreement subject to the condition precedent that the purchase of the DeGooyer's property be obtained. In fact, it was Defendant that recommended that the purchase agreement for the DeGooyer's property be entered into first before Defendant enter into an agreement to sell her property. Then after the purchase agreement for the DeGooyer's property had been entered into, Defendant was specifically advised that that agreement had been made and that is was conditioned upon Defendant's agreement to sell her property so that the contemplated multiple family development could be realized. Even after Defendant entered into the Option agreement, Defendant was continually advised about the progress of the approval from Salt Lake County for the proposed development on the two properties combined and was shown a site plan illustrating the proposed development on the properties.

It would be difficult to imagine how Defendant could have been better informed as to what the potential loss and damage to Plaintiff would be if Defendant breached the Option agreement. Indeed, it was only after Plaintiff realized that he could not continue to tie up the DeGooyer's property any longer after Defendants breach, that Plaintiff amended his complaint to claim only for damages for his loss and not alternatively for specific performance by Defendant.

Point II

PLAINTIFF IS ENTITLED TO RECOVER SPECIAL DAMAGES FOR THE COSTS AND EXPENSES INCURRED IN RELIANCE UPON THE OPTION AGREEMENT.

During the five month Option period, Plaintiff and Plaintiff's assignor, Mr. Heyrend, paid and incurred certain expenses in reasonable reliance upon the Option agreement and in preparation for obtaining approval from Salt Lake County for the proposed development on Defendant's property.

The Court, in its Findings of Fact, found that certain expenses were paid in the amount of \$415.54 for the engineering and preparation of a site plan illustrating the location of the proposed development on the properties. The Plaintiff also paid the sum of \$400.00 for drafting services to modify an existing office building plan and duplex plan to meet the requirements of Salt Lake County in its approval of the proposed development and for Plaintiff's use in obtaining financing. The Court also found that a cash earnest money deposit in the sum of \$300.00 was paid to the DeGooyers under the terms of the purchase agreement entered into on September 28, 1977, and such sum was forfeited to the DeGooyers after Defendant breached the Option agreement and the Plaintiff could not complete the purchase transaction.

Despite the fact that the total amount of these special costs and expenses was only \$1,115.54, and that they were out of pocket costs rendered useless directly by Defendants breach; nevertheless, the Court concluded that Plaintiff could not

recover these costs and expenses as special damages since the loss did not directly result from Defendant's breach (see Conclusions of Law, R.107).

The Utah Supreme Court in Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620 (Ut. 1979), a recent decision involving the breach of an Option agreement and an action for damages by the optionee-developer, stated the rule for special damages:

The term "general damages", as applied to the instant case, denotes those damages which in the usual course of things flow from the breach. They are of course limited to those resulting from the ordinary and obvious purpose of the contract, which in the case at hand would be the "loss of bargain" represented by the difference between the market value of the land and the option price. On the other hand, the term "special damages" denotes those damages which arise from the special circumstances of the case. They have been said to be such damages as, by competent evidence, are directly traceable to failure to discharge a contractual obligation.

This Court has on numerous occasions noted the distinction between general and special damages and the applicability of each as a proper measure of damages. We again reiterate that, in addition to general damages, one is entitled to recover those special damages which arise from circumstances peculiar to a particular case, provided they may be reasonably supposed to have been within the contemplation of the parties when the contract was made, and provided further, that they are properly pleaded and proved.

Applying the foregoing principles of law to the option agreement which is the subject of this case, it is obvious by the very nature of such an agreement that it was well within the contemplation of the contracting parties that certain relevant expenditures may be necessary and required on the part of the optionee in order to determine the feasibility of exercising the option. 592 P.2d 620 at P.624. (emphasis added).

The Court in Ranch Homes, Inc. held specifically that such special damages consisting of out of pocket expenditures in reliance on the Option agreement are recoverable by Plain-

tiff provided that such expenditures are found to have been reasonably made. The Court in striking down a portion of the damages awarded as being unreasonable expenditures drew a contrast between such excessive amounts and "... reasonable costs of preparing a preliminary plat necessary to secure favorable zoning and financing and to estimate development costs." Id at P.625.

In this case costs and expenses in the amount of \$815.54 were incurred directly in preparation of a preliminary site plan and modified building plan necessary for zoning approval and for financing, and although a modest sum, it was effective to secure favorable approval from Salt Lake County and approval of Plaintiff's financing.

The earnest money deposit of \$300.00 forfeited on the DeGooyer's purchase was directly lost as a result of Defendants breach and the Defendant knew prior to entering into the Option agreement that the parties contemplated making efforts to obtain approval from Salt Lake County for the proposed multiple family development on Defendant's property and that the DeGooyer's property was only of value for the proposed development with the Defendant's property. Even prior to the date of exercising the Option and Defendants breach, the Defendant had been shown the site plan illustrating the proposed development on her property combined with the DeGooyer's property and had been continually advised of the progress in obtaining approval from Salt Lake County for the development.

The trial judge's exclusion of these out of pocket costs



from the damage award was not based upon an error in the Findings of Fact with respect to the amounts expended, but was instead based upon an erroneous Conclusion of Law that Plaintiff was not entitled to these special damages as not directly resulting from Defendants breach. This conclusion is certainly not consistent with the Utah Supreme Courts pronouncement in Ranch Homes, Inc.

Point III

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW PLAINTIFF TO PUT ON EVIDENCE OF ATTORNEY'S FEES.

The written Option agreement executed by Defendant provided that in the event of Defendants breach, that the Defendant would be required to pay reasonable attorney's fees. Where a written contract or instrument has provision for reasonable attorney's fees then an award of such fees becomes an element of damages and the Court is required to award fees, although the amount of such award will rest within the discretion of the trial court, see Smith v. Warr, 564 P.2d 771 (Ut. 1977).

In this case, the Court concluded that Plaintiff was entitled to recover attorney's fees under the Option agreement however, evidence of attorney's fees was not presented at trial and Plaintiff's motion made at the beginning of Plaintiff's closing argument, to be permitted to offer evidence of attorney's fees, was denied (see Conclusions of Law R.108). The Court was cognizant of the fact that the Plaintiff was entitled to be awarded attorney's fees, but the Court would not indulge Plaintiff's counsel's mistake in resting his case

(immediately followed by Defendant's resting) and then remembering at the outset of his closing argument, that he had forgotten his last witness, namely himself, to provide evidence of attorney's fees. It was only 4:00 o'clock in the afternoon and the Court reporter, parties, and respective counsel were all present in Court when Plaintiff's counsel requested that the Court allow him to reopen his case for just a few minutes to put on evidence of attorney's fees. He advised the Court that he had an affidavit of attorney's fees itemizing the services that were performed and asked if the Court would permit him to offer it and to testify only on the total time and value so that Plaintiff could be awarded fees, but the Court denied this motion.

It is difficult to understand how the Defendant's case could have been prejudiced by allowing the Plaintiff to put on evidence of attorney's fees since there was more than ample time remaining before the end of the day for counsel for both sides to conclude their closing arguments.

It would seem understandable that after examining many witnesses and in the midst of the pressure of trial that Plaintiff's counsel, not being assisted, could make a technical mistake. However, for the Court to refuse to permit him to put on such evidence where no prejudice could result to the Defendant, other than to escape from paying any award of attorney's fees, appears inconsistent with the intent of the modern Utah Rules of Civil Procedure. The manifest intent was to liberalize procedure to accomplish a more just and equitable

able result and to avoid the technicalities and nice formalities that were sometimes an impediment in the past.

A particular example of this is Rule 61. "Harmless Error" which in substance requires that no errors or other technical defects or irregularities should disturb a judgment or order or serve as grounds for a new trial unless refusal to take such action appears to the Court inconsistent with substantial justice. Rule 61. ends by saying,

The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

It would seem that this last sentence means that an attorney should have no reason to complain about an error or defect that does not prejudice the substantial rights of the parties. It should be equally true that the Court should disregard the technical procedural defect by Plaintiff's counsel in resting his case before remembering that he had failed to put on evidence of attorney's fees, which did not prejudice Defendant, but did affect the substantial rights of the Plaintiff.

#### CONCLUSION

Based upon the foregoing analysis, it is respectfully submitted that Plaintiff is entitled to damages measured by the fair market value of Defendant's property considered with the enhancement in value attributable to Plaintiffs right to purchase the adjoining DeGooyer's property and provide necessary access to the Defendant's property. The

value of Defendant's property when considered with the benefit of an access was \$114,600.00 and after deducting the unpaid balance on the Option price in the amount of \$73,000.00, Plaintiff is entitled to damages in the amount of \$36,600.00.

Plaintiff is also entitled to special damages in the amount of \$1,115.54 representing the out of pocket costs and expenses paid for preliminary engineering and plans and the deposit lost upon the DeGooyer purchase transaction all of which costs and expenses were rendered valueless to Plaintiff by Defendants breach.

Plaintiff is further entitled to an award of reasonable attorney's fees in an amount to be determined by the trial court in accordance with the terms of the Option agreement.

Respectfully submitted this 27th day of February, 1980.

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BY:

  
L. BENSON MABEY