

1980

## Price Construction Co. v. Hal Foutz, Et Ux : Brief of Respondent

Utah Supreme Court

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### Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PRICE CONSTRUCTION CO., INC.,

Plaintiff-Respondent,

vs.

Case No. 16,688

HAL FOUTZ, et ux.,

Defendant-Appellants.

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BRIEF OF RESPONDENT

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Appeal from the Judgment of the Fourth Judicial  
District Court of Utah County, State of Utah  
Honorable David Sam, presiding

---

Thomas S. Taylor, for  
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55 East Center Street  
Provo, Utah 84601  
Attorneys for Appellants

RICHARD S. DALEBOUT  
60 East 100 South  
Provo, Utah 84601  
Attorney for Respondent

FILED

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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PRICE CONSTRUCTION CO., INC.,	*	
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Plaintiff-Respondent,	*	
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vs.	*	Case No. 16,688
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vs.	*	Case No. 16,688
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HAL FOUTZ, et ux.,	*	
	*	
Defendants-Appellants.	*	
	*	
	*	

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought suit in unlawful detainer against Defendants for possession of home and treble damages; together with an action for the Court determining ownership and immediate possession of the residence together with a reasonable attorney's fee and costs. Defendant counterclaimed for specific performance of contract or in the alternative to specific performance, damages, both compensatory and punitive together with a reasonable attorney's fee and costs.

DISPOSITION IN LOWER COURT

The Honorable David Sam of the Fourth Judicial District Court of Utah County, without a jury, ruled that the written Agreement between the parties was clear and unambiguous; that

Plaintiff was entitled to immediate possession of the house and ordered Defendants to vacate the residence; that Defendants were entitled to have returned the \$10,000.00 down payment less \$350.00 per month as rent for the premises during Defendants' occupancy. The Court ruled that the Defendants were in default under the Agreement between the parties. The Court further ruled that Defendants were guilty of unlawful detainer, that Plaintiff was entitled to treble damages but offset the treble damages by reason of the increased value of the house since the parties entered into the contract of sale. The Court allowed an offset of Plaintiff's damages against the \$10,000.00 down payment which Defendants made on the house. The Court gave Defendants credit for \$300.00 improvement on the yard, improvements in the house not to exceed \$1,000.00 and awarded Plaintiff \$1,550.00 in attorney's fee together with costs. The Court ruled that 61-2-2 UCA, 1953, was not applicable. The Court further ruled that the Plaintiff had made full disclosure to Defendants and had not misrepresented the house.

#### RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the decision and judgment of the lower Court.

#### STATEMENT OF FACTS

With reference to rule 75 (p) (2) URCP, the respondent disagrees with the statement of facts contained in the Brief of

the Appellant. The Respondent hereafter states the facts, relevant to the points raised on appeal as it finds them:

(The Agreement)

On May 25, 1978, the parties entered into a written Agreement, Exhibit 1. (T.3-4). Under the terms of the Agreement (Exhibit 1) Price Construction Company, the Plaintiff and Respondent, agreed to sell to Hal Foutz and Liane Foutz, the Defendants and Appellants, a certain residence located at 757 North 450 East, Orem, Utah. Exhibit 1 states, inter alia at lines 47 and 48: "this earnest money supersedes earnest money written November 29, 1977..." Exhibit 1 also acknowledges at lines 49 and 50 an earnest money deposit of \$600.00. Also, commencing at line 14, Exhibit 1 acknowledges receipt of a payment of \$10,000.00 from the buyers to the seller. Exhibit 1 provides that buyers shall pay monthly rent in the amount of \$350.00 per month until August 1, 1978 at which time the house was to close at which time the balance of \$41,400.00 shown on line 14 was to be paid. Exhibit 1 further provides that if the closing did not take place as scheduled on August 1, 1978, that buyers would return possession of the residence to the seller and the sellers would refund the \$10,000.00 deposit when the home was sold.

Exhibit 1 provides at line 52 that "time is of the essence of this Agreement."

The Court found that Exhibit 1 was not ambiguous and was a fair contract. (T.13, T.78, T.90). Accordingly, the

Court, with reference to lines 47 and 48 of Exhibit 1, quoted above, declined to receive into evidence a prior earnest money between the parties dated November 29, 1977.

There is no reference in the Agreement of the parties, Exhibit 1, to FHA or VA financing. The box on the multiple listing agreement (Exhibit 5) wherein a seller evidences an agreement to pay FHA or VA points is not checked.

(Alleged Misrepresentations as to FHA or VA Financing)

Apart from the written Agreements, the Defendants were advised that the Plaintiff would not agree to an FHA or VA sale (with an accompanying payment of "points" by seller). The record shows the following:

Mr. Whitney Lund was the real estate agent who handled the sales transaction for the subject residence. He had several discussions with the Defendants:

"I told Mr. and Mrs. Foutz that the seller had not agreed to pay the FHA or VA points on the home, but that the home-or rather they could probably finance the home FHA if they were willing to make an offer at a higher price than \$52,000.00 list price. (T.42)

On cross-examination by counsel for the Defendants, Mr. Lund clarified his testimony regarding FHA or VA financing:

"I did not tell Mr. Foutz that the house would qualify for FHA or VA. I told him it would probably qualify and we had discussed that prior to making the original offer in November of 1977. (T.51)

Later in the trial, Mr. Lund was again asked about FHA or VA financing. He was specifically asked if he had dis-



cussed such financing with Mr. Price, the principal of Price Construction Company and Mr. Lund stated:

"Okay. Mr. Price has always stated that he would not pay the discount points with regards to FHA or VA offers, but he would consider paying them if the sales price came in higher." (T.54)

Mr. Lund was then asked if he conveyed the foregoing conversation to the Defendants, to which he responded:

"We determined that we would go conventionally rather than FHA or VA." (T.54)

Mr. Lund was again asked about FHA or VA financing and the following questions and answers ensued:

"Q. Did you relay the conversation that you had with Mr. Price regarding the VA and FHA to Mr. and Mrs. Foutz?

A. Yes. I did.

Q. What response, if any did they make to the conversation that you relayed to them?

A. After showing them some financial calculations on how much money they would save by going either way, they determined that it would be best if they went conventionally and that is how the offer was made.

Q. I believe you testified that you filled out Plaintiff's Exhibit No. 1, is that correct sir?

A. Yes, I did.

Q. Was that done on the meeting on May 25, 1978, at which meeting Mr. Price and Mr. and Mrs. Foutz and yourself was present?

A. Yes.

Q. If Price Construction were to pay FHA and VA points, is there a customary practice in the industry with respect to the manner in which you indicate that on the prospective agreement?

A. There is a custom or practice in the industry, at least in this valley, if an offer is going to be made FHA or VA because points can fluctuate anywhere from

three to ten per cent. We normally put the maximum amount of points which the seller will agree to pay on a FHA or VA offer.

Q. Does any language such as that appear on Plaintiff's Exhibit No. 1 as you can observe it? (indicating)

A. No language appears." (T.55, emphasis added)

The multiple listing agreement, Exhibit 5, contains no reference to payment by seller of FHA or VA points and there was testimony that it is customary in Utah County to indicate an agreement by the seller to pay points if the residence is to be sold FHA or VA. (T.52)

Exhibit 1 was signed by the parties on May 25, 1978, at which meeting Mr. Whitney Lund, the real estate agent, Mr. Brian Crandall, a representative of Price Construction Company and Mr. and Mrs. Foutz were in attendance. With regard to that meeting, Mr. Crandall was asked whether FHA or VA points were discussed and Mr. Crandall responded:

"THE WITNESS: It was brought up by Mr. Foutz. He mentioned a little background at this point as they were pleading for an extension of time. They insisted they had financing in process and they wanted an extension and he brought up the point that the reasons they needed an extension is that they had wasted time trying to get FHA and VA financing.

Q. To which you responded?

A. I was surprised because this is the first time we had heard that they were even interested in FHA and VA being the offer was made conventional.

Q. What did you say to Mr. Foutz?

A. I said that it can't go FHA or VA.

Q. To which he responded?

A. He says that I know that now.

Q. This was prior to the signing of the agreement?

A. This was before they signed the offer. That is correct.

Q. That is all." (T.120-121, emphasis added)

Mr. Brian Crandall also testified as follows regarding  
FHA or VA financing:

Q. Now were you present at the time that Exhibit 1 was filled out?

A. Yes I was.

Q. Did you or the real estate agent at anytime suggest that it be placed on Exhibit 1 that the home would not qualify for FHA or VA financing?

A. No, it was not. It was not brought up.

Q. Didn't you think that was rather a significant point, a person buying a home?

A. No, because Mr. Foutz did understand that it not go FHA. There was no reason to put that on there." (T.122-123)

The Defendant himself was asked on cross-examination about his understanding regarding FHA and VA financing at the time Exhibit 1 was signed by the parties on May 25, 1978. Mr. Foutz testified as follows:

"Q. I would be glad to talk as loud as you would like. You testified did you not at the beginning of your testimony that at the meeting on May 25, 1978, you understood that Mr. Price would not pay the points?

A. That is correct. That is what Mr. Whitney Lund told us. Mr. Price never told us.

Q. You understood through Mr. Lund that Mr. Price would not pay FHA or VA points?

A. That is correct." (T.99, emphasis added)

(Plaintiff as Owner or a Broker)

On the question of ownership of the subject residence, Mr. Lawrence M. Price testified that he was president of Price Construction Company, Inc. (T.3) Mr. Price then testifies as follows:

"Q. Is Price Construction Company the owner and builder of the subject residence located at or about 757 North 450 East in Orem?

A. Yes sir."

There was no evidence contracting the foregoing testimony as to ownership of the subject residence.

The record demonstrates the following with respect to the \$600.00 earnest money and the \$10,000.00 down payment paid by the Defendants: Mr. Lawrence Price testified that the initial \$600.00 earnest money deposit was paid to Courtesy Realty at the time of the initial offer in approximately November of 1977 and that said amount was later in August of 1978 divided between Courtesy Realty and Mr. Whitney Lund and the Plaintiff corporation. Mr. Price further testified that the \$10,000.00 down payment was made directly to Price Construction Company by which the money was used to pay off obligations for purchase of the subject lot. (T.16)

Mr. Whitney Lund likewise testified that the \$10,000.00 down payment was made directly to Plaintiff. (T.38)

After the August 1, 1978 closing date had passed the \$600.00 was divided with Courtesy Realty retaining \$150.00,

the salesman, Mr. Lund receiving \$150.00 and Larry Price received \$300.00. (T.46-47) At page 87 of the transcript, the Defendant, Mrs. Foutz, testified on cross-examination that, apparently, it was her understanding that Price Construction would use the \$10,000.00, at the time it was received, to pay off certain debts with respect to the home. (T.87)

(Fairness and Equities Between the Parties)

Commencing at page 90 of the transcript, the Court made an extended observation concerning the facts in evidence to that point in the trial. Commencing part way through the comments of the Court, Judge Sam stated as follows:

"...but as I read the contract I feel that it appears on its face to be a very fair contract. I don't see anything on the contract on its fact that would in any way appear not to be entirely fair. In fact, it appears in my judgment to be fairer than most contracts relative to monies paid down. This contract provides that the \$10,000.00 will be returned and it appears that these buyers, unfortunate as it appears to be, that they are unable to get financing which I don't know how you can penalize the seller for that fact. The fact that they can't get financing, I don't know how you can penalize the seller for that unfortunate circumstance. I feel bad that they haven't been able to get financing, but to ask this court to carry this, the occupancy of this home on at infinitum--it has been occupied now since, apparently I gather now from this testimony I thought it was May of 1978 but it has been occupied by these Defendants since December of 1977 apparently?

MR. TAYLOR: That is correct sir.

THE COURT: And if they are unable to get financing, I don't know how you can penalize the seller for that unless the seller did some act that was so offensive in the way of fraud or misrepresentation or through some fraudulent inducement that causes these buyers these problems and I do not at this point see those

types of facts. Now what else do you have to present? You may proceed to try and convince me, but I don't see those types of facts and circumstances in this particular case. Now if you have law on this question of this seller being a real estate broker and using this \$10,000.00 in some dubious illegal way pursuant to the statutes, maybe you can convince me on this but this defendant says that it was her understanding that they were going to pay off the debts with that \$10,000.00. I don't see the type of conduct or even the statute we are concerned with here that would cause me to make some finding that would penalize this seller when it appears on the face of this contract that they prepared a contract for--on its face it appears to be extremely fair. Counsel now that is my observation. (T.90-91)

Lastly, it should be observed that two original transcripts of the trial proceedings have been made. The foregoing statement of facts have been taken from an original transcript dated July 17, 1979.

(Matters not in the Record)

At trial, there was contradictory testimony from witnesses for both Defendants as to whether the buyers, Mr. and Mrs. Foutz, as opposed to the seller, could pay the FHA and VA points. Subsequent to trial, Exhibits were attached to Memoranda by the parties supplementing their position on this issue. Appellants have included some of these Exhibits, which were not received into evidence, as part of their statement of facts. It is the position of the Plaintiff that these Exhibits, which were not received at trial, should not be considered on appeal. In the event the Court decides it should consider the same, the Plaintiff makes reference to the letter attached to its Memorandum of Points

and Authorities dated June 7, 1977, from Mr. L. C. Romney, Supervisor of Region VIII of the Department of Housing and Urban Development to the effect that regulations of the Department of Housing and Urban Development "require that the discount points, if any, are paid by the seller of the property."

A R G U M E N T

POINT I

THE FINDING OF FACT MADE BY THE TRIAL COURT ARE SUPPORTED BY COMPETENT EVIDENCE AND SHOULD NOT BE DISTURBED ON APPEAL.

It is the established rule of the Utah Supreme Court that Findings of Fact made by a trial judge will not be disturbed on appeal if they are supported by competent evidence.

Mr. Lawrence Price, President of the Plaintiff corporation testified that that corporation was the owner and builder of the subject residence. The Sales Agreement, Exhibit 1 recites the Plaintiff, Price Construction Company as the seller of the subject agreement. Based on this competent evidence, it is respectfully submitted that the trial court, Judge Sam, correctly found at paragraph one of the Findings of Fact that the Plaintiff, a Utah corporation, is the owner of a residence located at or about 757 North 450 East, Orem, Utah.

The transcript of proceedings and the foregoing Statement of Facts demonstrate that the Defendants and Appellants were repeatedly advised that the Plaintiff would not agree to FHA or VA financing. Consistent therewith, the multiple listing agreement, Exhibit 5, and the actual agreement between the parties, Exhibit 1, contains no expression to the effect that the seller and Plaintiff would pay FHA or VA points. Testimony was received that it is customary in the real estate practice in Utah County to show in the earnest money agreement, that the seller will



pay FHA or VA points because the same are a considerable expense to the seller. Accordingly, there was considerable competent evidence to support findings to the effect that the Plaintiff did not agree to sell the subject residence by FHA or VA financing.

Further, there is competent evidence to support the findings of the Court that the Plaintiff made no misrepresentations to Defendants prior to signing the subject agreement, Exhibit 1.

Mr. Lawrence Price and Mr. Whitney Lund both testified that the \$600.00 earnest money deposit was paid to Plaintiff through Century 21 Courtesy Realty and that the Defendants thereafter paid \$10,000.00 as down payment directly to the Plaintiff and that Defendants had full knowledge and disclosure of these actions.

The Defendants admit they remain in the subject residence and that they did not close as required on August 1, 1978.

For the foregoing reasons, the Plaintiff and Respondent respectfully submit that the trial court correctly found in favor of the Plaintiff on all of the foregoing Findings of Fact, which Findings should be sustained by the Court on appeal.

POINT II

THE PROVISIONS OF SECTION 61-2-1  
ET SEQ. UCA DO NOT DEMONSTRATE ANY  
RELIEF IN FAVOR OF THE APPELLANT AND  
ADVERSE TO THE RESPONDENT UNDER  
THE FACTS OF THIS CASE

The Court at paragraph one (1) of its Findings of Fact  
found:

"Plaintiff, a Utah Corporation, is the owner of a residence located at or about 757 North 450 East, Orem, Utah."

That same Plaintiff is the seller to the Defendants under the terms of the subject Agreement, Exhibit 1.

The provisions of Section 61-2-1 et seq. UCA control the activities, inter alia of real estate brokers as defined in Section 61-2-2 UCA. An exception to the application of Section 61-2-1 et seq. UCA is found in the second paragraph of Section 61-2-2 UCA:

"The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of [or] a will nor to their employees." (Section 61-2-2 UCA, emphasis added)

It is thus respectfully submitted that the provisions of Section 61-2-1 et seq. UCA do not apply to the Plaintiff in this action which was selling property owned by it.

In addition, reference is made to Section 61-2-17 which is the penalty provision for the subject chapter on real estate brokers. Subsection (a) of 61-2-17 provides criminal penalties and thus does not have application to the present action. Subsection (b) provides for money damages for violation of the provisions of Section 61-2-1 et seq. UCA. With reference to that subsection, it is respectfully submitted that no monies were received by the Plaintiff as commission, compensation or profit by or in consequence of the Plaintiff's violation of any provision of the subject act, nor was there any evidence demonstrating damages within the meaning of said subsection.

For the foregoing reasons, the Plaintiff and Respondent respectfully submits to the Court that no claim or relief under the provisions of Section 61-2-1 et seq. UCA has been demonstrated under the facts of the case as found in the transcript of the proceedings.

POINT III

DEFENDANTS AND APPELLANTS HAVE NOT  
AS A MATTER OF LAW ESTABLISHED THEIR  
AFFIRMATIVE DEFENSE OF MISREPRESENTATION.

The defense of misrepresentation is affirmative and the burden is upon the Defendant to establish it by a preponderance of the evidence.

The contractual defenses of misrepresentation and fraud each include the proposition that the offending party must be demonstrated to have misstated a material fact and that the misstatement, if any, was relied upon by the other party, in this case the Defendants, as a basis upon which he determined to enter into the subject Agreement.

In the present action, Mr. Brian Crandall, Mr. Lawrence Price and Mr. Whitney Lund affirmatively testified that at all times they had advised Mr. Foutz that Price Construction Company would not agree to sell the subject house by means of FHA or VA financing. Mr. Foutz, upon cross-examination, indicated that prior to entering into the Agreement on May 25, 1978, he knew Price would not pay FHA or VA points.

Cross-examination of Mr. Foutz demonstrated that the Plaintiff made no misstatement to mislead Mr. Foutz with respect to FHA or VA financing prior to entering into the May 25, 1978 Agreement. Cross-examination likewise demonstrated that Mr. Foutz could not have relied upon Price Construction Company to cooperate with the FHA or VA financing because he understood prior to entering into the subject Agreement that Mr. Price would

not cooperate with the same.

Thus, there is neither a misstatement nor any reliance upon any misstatement.

In Sharp vs. Idaho Investment Corp., 504 P.2d 386 (Idaho 1972), a Dr. Sharp alleged fraudulent misrepresentations on the part of the Idaho Investment Corporation pursuant to which he purchased certain stock. The Idaho Supreme Court, in the foregoing case, used the following language in regard to reliance

"Reliance is a fundamental element of fraud which must be proven by clear and convincing evidence. In order for the respondent, Dr. Sharp, to secure redress he must have, in fact, relied upon a statement or representation as an inducement to purchase the stock. We find a notable absence of the element of reliance supporting the district court's finding of fraud.

On direct examination Dr. Sharp was asked: "Doctor, would you tell me why you purchased stock in the Idaho Investment Corporation?" Dr. Sharp replied, "Because I believed Mr. Neilson. I was acquainted with Mr. Frazier and other officers of Sierra Life. I knew the officers and expected it to be a profitable venture." This answer reveals a common theme which appears throughout the record. Dr. Sharp was an investor in Sierra Life Insurance Company, an Idaho corporation. By coincidence most of the officers of Idaho Investment Corporation were officials of Sierra Life Insurance Company. For example, Fred Frazier was president of both Idaho Investment Corporation and Sierra Life Insurance Company. Although this inter-locking feature of corporate officials was publicized extensively by Idaho Investment Corporation in its sales materials and company news bulletins, neither the respondents nor the district court chose to attach any significance to its connection with the element of reliance. From Dr. Sharp's own testimony it is evident that rather than relying on representations or misstatements by Idaho Investment Corporation and its agents he relied on expectations based on his experience with another corporation." Sharp vs. Idaho Investment Corporation, supra, (emphasis added).

The Defendant, Mr. Foutz was questioned at page 99 of the transcript to determine if he had, in signing the subsequent Agreement, Exhibit 1, relied upon facts relating to the application of FHA or VA financing to the subject residence. In the manner of Dr. Sharp in Sharp vs. Idaho Investment Corporation, supra, Mr. Foutz admitted that he knew when he signed the subject Agreement that Price Construction would not agree to such forms of financing. He thus could not have justifiably relied upon ideas to the contrary.

For the foregoing reasons, it is respectfully submitted that the Defendants and Appellants have failed to establish their affirmative defense of misrepresentation.

POINT IV

THE SUBJECT AGREEMENT IS CLEAR AND UNAMBIGUOUS; PAROLE EVIDENCE IS NOT ADMISSABLE; DEFENDANTS ARE IN DEFAULT OF THE AGREEMENT AND FORFEIT THEIR CLAIMS TO THE SUBJECT PROPERTY; PLAINTIFF IS ENTITLED TO AN ATTORNEY'S FEE BECAUSE OF DEFENDANTS' DEFAULT.

The trial court correctly ruled that the Agreement between the parties is fair, clear and not ambiguous. The trial court thus correctly held the parties to the terms thereof and correctly refused to permit the Defendants to vary the terms of that Agreement as to financing and other matters.

The subject Agreement, Exhibit 1, provides that Defendants were to close on August 1, 1978. There are no exceptions stated. The Defendants were to pay the balance of \$41,400.00 at the closing. No exceptions are stated. If the closing did not take place on August 1, 1978, the Defendants were to move out and they would be repaid their \$10,000.00 down payment when Plaintiff could resell the home. No exception is stated. Time is of the essence. See line 52 of the subject Agreement.

Defendants did not close as required and they refused to move out of the subject residence. They were in default and forfeited their claims against the property. Plaintiff is entitled to a reasonable attorney's fee, lines 45-46 of Exhibit 1, because of the defendant's default.

Defendants will receive back their down payment less rent accrued and Plaintiff is therefore not unjustly enriched.

Defendants can not rightly claim to have specific enforcement of this subject Agreement with respect to which they are in default.

The trial court correctly refused to permit the Defendants to amend the terms of the Agreement, Exhibit 1, by parole evidence.

The intent and obligations of the parties to their Agreement should be determined from the language within the four corners thereof because it is free of ambiguity.

The foregoing rule represents a conscious policy decision on the part of the Utah Supreme Court. The parties should be held to their clearly expressed intention or the orderly conduct of affairs would quickly stop. If the Defendants were allowed to amend the Agreement to now substitute their wish to finance by way of FHA or VA financing and the accompanying payment of discount points together with other privileges all of which are clearly not referred to in the subject Agreement, there would be an end to reliable and dependable contracts. Thus, Justice Henroid in Jensen Used Cars vs. Rice, (1958):

"Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses.





The terms of the Agreement of May 25, 1978, control. There is no reference to payment of FHA or VA discount points and no agreement to cooperate in FHA or VA financing. The terms of that Agreement are quite specific as to the amount of cash to be paid and the time at which such shall be paid. The Agreement is likewise clear that time is of the essence and it is further clear that previous agreements are specifically superseded by the subject Agreement. Whether or not Price Construction Company could have agreed to FHA or VA financing is immaterial. The Plaintiff simply did not agree to it.

For the foregoing reasons, it is respectfully submitted that the lower court correctly held the parties to the terms of the subject Agreement and refused specific enforcement of the subject Agreement in favor of the Defendants and granted Plaintiff a reasonable attorney's fee.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court correctly determined the facts in this matter based upon the evidence received at trial. It is respectfully submitted that the Findings of Fact and Conclusions of Law made by the Court after trial accurately state the facts in the case and the Plaintiff respectfully requests the Court to affirm the decision of the lower court, the Honorable David Sam, presiding.

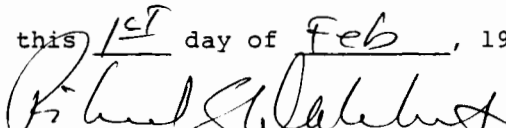
Respectfully submitted:



RICHARD S. DALEBOUT  
Attorney for Plaintiff  
60 East 100 South  
Provo, Utah 84601

CERTIFICATE OF MAILING

This is to certify that two true and exact copies of the foregoing Brief of Respondent were mailed to Thomas S. Taylor, Attorney for Appellants, 55 East Center Street, Provo, Utah 84601, postage prepaid, this 1<sup>st</sup> day of Feb, 1980.



RICHARD S. DALEBOUT, Attorney