

1989

W. Kent Brown, David B. Gardner, Glade Southam
and Nolan H. Olsen v. Melvin Keith Burningham,
et al. : Appellant's Response to Petition for
Rehearing

Utah Court of Appeals

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BRIEF

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DOCKET NO. 890501-CA IN THE UTAH COURT OF THE APPEALS

file

W. KENT BROWN, DAVID B. GARDNER,
GLADE SOUTHAM and NOLAN H. OLSEN,
Plaintiffs,

-v-

MELVIN KEITH BURNINGHAM, et al.,
Defendants.

COMMERCE FINANCIAL, a Utah
corporation,
Cross-Claimant and
Appellant,

-v-

MARKWEST CORPORATION,
Cross-Claim Defendant
and Appellee.

COMMERCE FINANCIAL, a Utah
corporation,
Third-Party Plaintiff
and Appellant,

-v-

HOWARD H. HUCKS and DANIEL B.
HUCKS,
Third-Party Defendants
and Appellees.

APPELLANT'S
RESPONSE TO
PETITION FOR REHEARING

890501-CA

Case No. 890108-
Priority 14(b)

APPEAL FROM A FINAL ORDER OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE RAYMOND S. UNO

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OCT 24 1990

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IN THE UTAH COURT OF THE APPEALS

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TABLE OF CONTENTS

	PAGE(S)
STATEMENT OF ADDITIONAL FACTS.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	
I. THE MATTERS DISCUSSED IN THE PETITION FOR REHEARING ARE RAISED FOR THE FIRST TIME AND SHOULD NOT BE CONSIDERED BY THIS COURT.....	4
II. COMMERCE FINANCIAL SEEKS ONLY TO RECOVER ON FUNDS ACTUALLY DISBURSED.....	5
III. THE HOLDING IN THE <u>COX</u> CASE PRECLUDES AN AWARD OF DAMAGES AS AN OFFSET.....	6
IV. THE NOTES ARE UNAMBIGUOUS. EXTRINSIC EVIDENCE OF "CONDITIONS AND CONTINGENCIES" CANNOT BE CONSIDERED.....	7
V. THE ISSUE OF ATTORNEYS' FEES WAS RESERVED, BY STIPULATION, PENDING JUDGE UNO'S DECISION OF THE MERITS OF THE CASE.....	8
CONCLUSION.....	9

TABLE OF AUTHORITIES

	PAGE(S)
<u>CASES</u>	
<u>Anderson v. Gardner</u> , 647 P.2d 3, 4 (Utah 1982).....	8
<u>Cannon v. Taylor</u> , 88 Nev. 89, 493 P.2d 1313, 1314 (1972).....	4
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985, 988 (Utah 1988).....	8
<u>Prowswood, Inc. v. Mountain Fuel Supply Co.</u> , 676 P.2d 455 (Utah 1984).....	4
<u>Tracy v. Univ. of Utah Hosp.</u> , 619 P.2d 341, 342 (Utah 1980).....	4, 7
<u>Utah Farm Prod. Credit Ass'n v. Cox</u> , 627 P.2d 62, 64-65 (Utah 1981).....	3, 5, 6 7, 9
<u>Vanek v. Kirby</u> , 253 Or. 494, 454 P.2d 647 (1969).....	4
<u>Wernberg v. State</u> , 519 P.2d 801, 804 (Alaska 1974).....	4
<u>RULES</u>	
Utah R. App. P., Rule 35.....	5

IN THE UTAH COURT OF THE APPEALS

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APPEAL FROM A FINAL ORDER OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE RAYMOND S. UNO

STATEMENT OF ADDITIONAL FACTS

The Statements of Facts appearing in Appellant's Brief (at pp. 6-10) and Appellant's Reply Brief (at pages 1-2) set forth facts material to a consideration of the questions presented in this Petition for Rehearing. The following additional facts

are necessary to correct misleading statements of supposed fact appearing in Respondent's [sic] Petition for Rehearing, at pages 1 through 4, and to include facts omitted from that recitation:

1. Commerce Financial has never sought to recover the full face amount of the construction note, \$258,000.00. Rather, Commerce Financial has consistently sought, and continues to seek, to recover, with respect to that note, only those funds, which were actually disbursed to or on behalf of the appellees under that note, plus accrued interest thereon, \$128,399.21 as of June 8, 1988 (Exhibit P-39).

2. The \$18,241.70, condominium-secured note (fact no. 5 of Appellant's Brief) and the \$20,000.00, unsecured note (fact no. 7 of Appellant's Brief) were demand promissory notes separate from the \$258,000.00 construction loan note. Appellees unquestionably received the full amounts set forth on the faces of those two notes.

3. The trial court specifically found that appellees failed to seek alternate funding and that appellees' purported damages were too speculative. The trial court determined that no damages should be awarded to appellees. (R. at 509-510)

4. Contrary to appellees' assertion that they no longer had the ability to seek alternate financing, the Memorandum Decision specifically states: "Because of his [Howard Hucks's] purported excellent credit rating, obtaining additional funding

appeared good." (R. at 509) Additionally, Markwest and Howard Hucks had a net worth of millions and millions of dollars (Exhibit P-42).

SUMMARY OF ARGUMENT

Appellees (petitioners, with respect to their pending request) did not appeal the trial court's determination that they were not entitled to recover damages. Such putative damages are, in any event, too speculative (as the trial court has recognized), and that issue cannot be raised for the first appellate time in a petition for rehearing.

Commerce Financial is seeking only the principal balance actually disbursed under the construction promissory note, plus accrued interest (not the face amount of \$258,000.00). The full face amounts of the condominium secured note and the unsecured \$20,000.00 note were actually disbursed, and Commerce Financial seeks those full amounts plus interest accruing thereon.

The case of Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d 62 (Utah 1981), is controlling. Appellees were not entitled to an award of damages. Even if they were, which they are not, the trial court awarded them no damages. They did not appeal that determination. They are, accordingly, entitled to no offset against the amounts due under the notes.

The notes are unambiguous. Extrinsic evidence regarding various "conditions and contingencies" cannot be considered.

Finally, the attorneys' fees issue was reserved, by stipulation, at the time of trial. On remand for entry of judgment, the amount of Commerce Financial's reasonable attorney's fee should be determined by the trial court.

ARGUMENT

I

THE MATTERS DISCUSSED IN THE PETITION
FOR REHEARING ARE RAISED FOR THE
FIRST TIME AND SHOULD NOT BE
CONSIDERED BY THIS COURT.

Appellees request that this case be remanded to the trial court for a determination of the damages suffered by the appellees. The determination regarding that aspect of this case has, however, already been made by the trial court. Judge Uno found that appellees were not entitled to recover damages. (R. at 509-510) As Judge Uno stated: "Construction on the tract may have been a losing project, as many surmised and both parties saved money by discontinuing the project." (R. at 510) Petitioners did not appeal that determination of the trial court and failure to timely perfect an appeal is jurisdictional. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 455 (Utah 1984); Tracy v. Univ. of Utah Hosp., 619 P.2d 341, 342 (Utah 1980). Further, an argument not raised on appeal cannot be considered on rehearing. Wernberg v. State, 519 P.2d 801, 804 (Alaska 1974); Cannon v. Taylor, 88 Nev. 89, 493 P.2d 1313, 1314 (1972); Vanek v. Kirby, 253 Or. 494, 454 P.2d 647 (1969).

Finally, the purpose of a petition for rehearing is to state "with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended" Rule 35, Utah R. App. P. Appellees are, by raising all new issues in their Petition, in effect taking a second bite at the apple. Having failed to address the Cox case in their Respondents' Brief and having failed to appeal the trial court's determination regarding their supposed damages, appellees now seek to remedy those omissions under the naked guise of contending that there are points of law or fact which they claim this Court has overlooked or misapprehended.

II

COMMERCE FINANCIAL SEEKS ONLY TO RECOVER ON FUNDS ACTUALLY DISBURSED.

At trial, Commerce Financial introduced three exhibits and oral testimony, all unrebutted, showing the amounts due under each note. Exhibit P-39, coupled with the testimony of Commerce Financial's Richard Abelhouzen, showed \$128,399.21 as the amount due, as of June 8, 1988, under the construction note with a face value of \$258,000.00. It is undisputed that the amounts disbursed under the construction loan, plus the full amounts of the two separate notes, were received by or paid on behalf of appellees. Commerce Financial seeks only to recover the benefit of what appellees actually received, not, as argued in the Petition for Rehearing, money never paid out. This applies to the two smaller notes, as well.

III

THE HOLDING IN THE COX CASE PRECLUDES AN AWARD OF DAMAGES AS AN OFFSET.

The trial court found that any damages claimed by appellees were legally noncognizable, due to their speculative nature and the failure of appellees to seek alternative financing (a finding, as noted above, not appealed by appellees). Appellees argue, without citing any legal authority, that an element of reasonableness should be implied, and that the case should be remanded so that they might be allowed to put on evidence regarding the question of whether a reasonable person would have pursued alternate financing. The Cox case requires, however, that a borrower "actively seek alternative sources of financing." (Emphasis added.) Utah Farm Prod. Ass'n v. Cox, 627 P.2d at 65. As Judge Uno noted in his Memorandum Decision, Howard Hucks testified that he and Markwest did not even attempt to find alternative financing for the project. (R. at 501)

Further, the defendant in Cox made a similar argument, claiming that he believed such exploration would be "futile." The Utah Supreme Court, rejecting that contention, stated:

The argument is without merit. Had he sought alternative financing, defendant may well have been able to satisfy the debt in full, thereby rendering any threat of foreclosure meaningless. Had he been able to secure even a lesser loan from an alternative source so as to demonstrate his good faith and desire to continue the turkey

business, he may have been able to stave off threat of foreclosure. . . .

Id. at 65.

Appellees' assertion that alternative financing was not pursued because of their dire financial circumstances is, among other things, contrary to the findings of the trial court and the evidence adduced at trial. Judge Uno noted in his Memorandum Decision that "[b]ecause of his [Howard Hucks's] purported excellent credit rating, obtaining additional funding appeared good." (R. at 509) At the time the initial loan was made, less than a year prior to the cessation of disbursements under the construction loan, the assets of Markwest and Howard Hucks were represented to be over \$6,000,000.00 and almost \$7,000,000.00 respectively (Exhibit P-42, R. at 552).

However, even if, as appellees propose, a standard of reasonableness is implied in the duty to seek alternative financing, appellees still are not entitled to setoff against the amounts due Commerce Financial. Judge Uno found that appellees had suffered no legally cognizable damages, a finding that has not been appealed and is now the law of the case. Tracy v. Univ. of Utah Hosp., 619 P.2d at 342 (Utah 1980).

IV

THE NOTES ARE UNAMBIGUOUS. EXTRINSIC
EVIDENCE OF "CONDITIONS AND
CONTINGENCIES" CANNOT BE CONSIDERED.

Appellees assert, in Point V of their Petition for Rehearing, that this Court failed to consider "conditions and contin-

gencies agreed to by the parties" and that findings were made by the trial court in that respect. Appellees fail, however, to specify what the supposed "conditions and contingencies" were and to identify the findings of the trial court relating thereto.

In any event, the notes are unambiguous and have been treated as such by the parties and the trial court throughout the course of these proceedings. Only when an ambiguity exists which cannot be reconciled by an objective and reasonable interpretation of the contract may resort be had to the use of extrinsic evidence. Anderson v. Gardner, 647 P.2d 3, 4 (Utah 1982). Accordingly, any supposed "conditions and contingencies" cannot be considered to alter the terms of the notes.

V

THE ISSUE OF ATTORNEYS' FEES WAS
RESERVED, BY STIPULATION, PENDING
JUDGE UNO'S DECISION OF THE MERITS
OF THIS CASE.

Attorneys' fees, in Utah, are recoverable only in accordance with the terms of the contract between the parties. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). In this case, the notes provided for "costs and expenses incurred in the collection of this Note including reasonable attorney's fees. . . ."

Counsel for the parties stipulated, at trial, to reserve the issue of attorneys' fees pending the decision of Judge Uno. When the trial court ruled adversely to Commerce Financial,

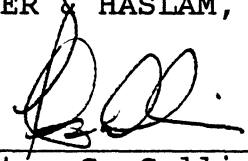
concluding that Commerce Financial was not entitled to collect the sums due under the notes, it became unnecessary for the trial court to hear evidence as to the reasonable attorney's fee incurred by Commerce Financial. Since the decision of this Court holds that Commerce Financial is entitled to collect the amounts due, the trial court should, on remand for entry of judgment in favor of Commerce Financial, be directed to take evidence on the issue of the amount of Commerce Financial's reasonable attorney's fee.

CONCLUSION

Commerce Financial seeks only to recover the sums actually disbursed to or on behalf of appellees, plus interest thereon. The Cox case is controlling. Because appellees did not seek alternate financing, they are not entitled to damages, which, in any event, are too speculative. Appellees did not appeal the trial court's finding in this connection, either by initial appeal or cross-appeal. The notes are unambiguous. Extrinsic evidence cannot be considered to aid in their interpretation. All of the issues in the Petition for Rehearing are raised for the first time and cannot be considered now by this Court. For all these reasons, Commerce Financial respectfully submits that the Petition for Rehearing should be denied, and that this case be remitted, without further ado, to the trial court, for entry of judgment in favor of Commerce Financial.

Respectfully submitted this 24th day of October, 1990.

WINDER & HASLAM, P.C.

By 
Peter C. Collins
Kathy A. F. Davis
Attorneys for Appellant
Commerce Financial

CERTIFICATE OF MAILING

I hereby certify that, on the 24th day of October, 1990,
I caused four true and correct copies of the foregoing APPEL-
LANT'S RESPONSE TO PETITION FOR REHEARING to be mailed, postage
prepaid, to B. Ray Zoll, Esq., ZOLL & BRANCH, 5300 South 360
West, #360, Murray, Utah 84123.



skt WP1 MRKWST.RSP