

1988

Michael Strand, Lois Strand, Mingo Oil Company v. David Hammons, The Estate of Herb Hammons, and Electro Technical Corporation : Reply Brief

Utah Supreme Court

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



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John C. Green, Kim M. Luhn; Gustin, Green, Stegall and Liapis; attorneys for respondents.

Daniel W. Jackson; attorney for appellants.

Recommended Citation

Reply Brief, *Strand v. Hammons*, No. 880250.00 (Utah Supreme Court, 1988).

https://digitalcommons.law.byu.edu/byu_sc1/2212

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

K F U

50

.A10

DOCKET NO. 880250 CA

UTAH COURT OF APPEALS

SUPREME COURT OF THE STATE OF UTAH

MICHAEL STRAND, LOIS STRAND,
and MINGO OIL COMPANY, a Utah
corporation,

Plaintiffs/Appellants,

vs.

DAVID HAMMONS, THE ESTATE OF
HERB HAMMONS, (Deceased), and
ELECTRO TECHNICAL CORPORATION,
a Utah corporation,

Defendants/Respondents.)

Supreme Court No. 860519

88-0250-CA

REPLY BRIEF

APPEAL BY PLAINTIFFS AND COUNTERCLAIM DEFENDANTS
FROM THE FINAL JUDGMENT OF THE HONORABLE
JUDITH M. BILLINGS DISMISSING PLAINTIFFS'
CAUSES OF ACTION AND ENTERING JUDGMENT
AGAINST COUNTERCLAIM DEFENDANTS

Daniel W. Jackson
The Walker Center, Suite 560
175 South Main Street
Salt Lake City, UT 84111
Telephone: (801) 328-1800
Attorney for Appellants

John C. Green
Kim M. Luhn
GUSTIN, GREEN, STEGALL & LIAPIS
48 Post Office Place, 3rd Floor
Salt Lake City, UT 84101
Telephone: (801) 532-6996
Attorney for Respondents

FILED

NOV 18 1987

Clerk, Supreme Court, Utah

MICHAEL STRAND, LOIS STRAND,
and MINGO OIL COMPANY, a Utah
corporation,

Plaintiffs/Appellants,

vs.

DAVID HAMMONS, THE ESTATE OF
HERB HAMMONS, (Deceased), and
ELECTRO TECHNICAL CORPORATION,
a Utah corporation,

Defendants/Respondents.)

Supreme Court No. 860519

APPEAL BY PLAINTIFFS AND COUNTERCLAIM DEFENDANTS
FROM THE FINAL JUDGMENT OF THE HONORABLE
JUDITH M. BILLINGS DISMISSING PLAINTIFFS'
CAUSES OF ACTION AND ENTERING JUDGMENT
AGAINST COUNTERCLAIM DEFENDANTS

John C. Green
Kim M. Luhn
GUSTIN, GREEN, STEGALL & LIAPIS
48 Post Office Place, 3rd Floor
Salt Lake City, UT 84101
Telephone: (801) 532-6996
Attorney for Respondents

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENT ONE	
AS A MATTER OF LAW THE DELIVERY OF THE \$150,000 AS PAYMENT OF THE INVESTMENT PRICE CAN NOT CONSTITUTE CONSIDERATION FOR THE EXECUTION OF THE \$250,000 PROMISSORY NOTE	4
ARGUMENT TWO	
THE TESTIMONY OF PLAINTIFF STRAND WHEN PLACED IN CONTEXT DOES NOT SUPPORT THE TRIAL COURT'S DECISION	8
ARGUMENT THREE	
THE DECISION TO CONVERT THE LOAN TO AN INVESTMENT CONSTITUTED AN ENFORCEABLE ACCORD AND SATISFACTION RATHER THAN MERELY A CHANGE IN THE "LABEL" USED TO DESCRIBE THE AMOUNT GIVEN	11
ARGUMENT FOUR	
HAMMONS' TESTIMONY CONCERNING AN ORAL AGREEMENT TO REPAY THE MONIES INVESTED DOES NOT ESTABLISH THAT NO ACCORD AND SATISFACTION WAS ENTERED INTO BY THE PARTIES	14
ARGUMENT FIVE	
THEIR WAS A MEETING OF THE MINDS BETWEEN THE PARTIES CONCERNING THE CONVERSION OF THE INITIAL \$100,000 DEBT INTO AN INVESTMENT	16
ARGUMENT SIX	
THE PRESENT APPEAL IS NOT FRIVOLOUS	17
CONCLUSION	18

CASES CITED

	Page
<u>B. B. & S. Construction Inc. v. Stone,</u> 535 P.2d 271, 275 N.8 (Alaska, 1975)	6
<u>Baggs v. Anderson,</u> 528 P.2d 141, 143 (Utah, 1974)	6
<u>Boardman v. Dorsett,</u> 685 P.2d 615 (Wash. App. 1984)	6
<u>Hurley v. Hurley, N.M.,</u> 615 P.2d 256 (1980)	6
<u>Keil v. Glacier Park, Inc.,</u> 614 P.2d 502 (Mont, 1980)	5
<u>VanTassell v. Lewis,</u> 222 P.2d 350 (Utah 1950)	6, 8

STATEMENT OF FACTS

In the Defendants' recitation of the facts, they improperly characterize certain critical testimony and totally misstate other pertinent facts.

In describing the Defendants' investment in the deep test well, they state that Mr. Strand offered to the Defendants a forty percent interest in the Mingo 13-13 partnership in return for three things. In the first place there is no evidence in the record to support any factual conclusion except that Mr. Strand offered the 40% interest for payment of \$250,000 cash and a promissory note for \$250,000. In fact, at trial, Mr. Hammons testified that the agreement between the parties was that the Defendants would pay \$250,000 in cash and issue a promissory note for an additional \$250,000 as consideration for the receipt of the 40% interest. (R. 460-461, ls. 15-25; 1-8). And, Mr. Hammons further testified that there were no additional agreements regarding the investment. (R. 461, ls. 4-5).

Notwithstanding this testimony, Defendants represented to this Court in their Statement of Facts that the Hammons agreed to merely convert the status of the original \$100,000 from that of the loan to an investment in consideration for the conveyance of the 40% interest. At trial, Hammons did not qualify in any manner the conversion of the initial loan as

suggested by the Defendants upon appeal. As Mr. Hammons explained.

Q. What was your contribution or your consideration for your investment in the deep test?

A. Well, we had put in \$250,000 cash and it was explained to us by Mr. Strand and by Bruce Wisan and Lynn Daines that we would be able to take a \$250,000 additional tax credit by agreeing to pay the driller, or the partnership, an additional or like amount, say, in this instance as it turns out, was an additional two-hundred fifty, that would be paid exclusively out of the proceeds of the well. And we had that conversation a dozen times. I can remember it as vivid as anything. If there's no oil there's no payback.

Q. So there was \$250,000 that was invested in cash, in the deep test.

A. That is correct.

(R. 448-449, ls. 17-22; 1-5).

When asked directly if there was an agreement between Defendants and Plaintiffs concerning the conversion of the initial loan into an investment, Mr. Hammons answered unequivocally that the agreement between the parties was that the initial loan was to be converted into the investment. (R. 468, ls. 18-25).

Similarly the Defendants state that the second of the three things allegedly given by the Hammons for the investment in the oil well, was that the Hammons advanced to Mr. Strand an additional \$150,000 in cash in return for the execution of a second promissory note in the amount of \$250,000. Again, in direct contradiction to this factual allegation, Mr. Hammons'

testimony at trial established that the acceptance of the Plaintiffs' offer and part performance of the investment contract took place weeks before the second promissory note was executed and had nothing to do with that note. As Mr. Hammons explained:

Q. And the investment decision was made prior to this promissory note.

A. Which promissory note?

Q. To the second promissory note.

A. Yes, to the \$250,000 promissory note.

(R. 471, ls. 17-21).

In fact, Hammons testified at trial that the second promissory note didn't relate to that investment decision but rather, stood on its own. (R. 445, ls. 22-25).

The Defendants next serious inappropriate characterization of the evidence relates to the 1981 and 1982 tax returns for Mingo Oil 13-13 partnership. Contrary to the assertion of Defendants that those returns and related documents did not evidence their ownership interest, the accountant for both parties testified that in fact the income tax filings, for those years did contain that evidence. (R. 411, ls. 1-21; R. 413, ls. 7-22).

Finally, Defendants again misstate the evidence when they represent to the Court that during May, 1982, David Hammons

made demand on the notes. The record reflects that in May of 1982, Mr. Hammons, rather than make demand on the notes, offered to return all the Defendants' interests in return for the money invested. (R. 473, ls. 2-13).

ARGUMENT ONE

AS A MATTER OF LAW THE DELIVERY OF THE \$150,000
AS PAYMENT OF THE INVESTMENT PRICE CAN NOT
CONSTITUTE CONSIDERATION FOR THE EXECUTION
OF THE \$250,000 PROMISSORY NOTE

In an attempt to support the trial court's decision that the giving of \$150,000 constituted adequate consideration for the \$250,000 promissory note, the Defendants argue that the parties entered into a binding agreement when David and Herb Hammons delivered to Michael Strand and Mingo Oil Company \$150,000 in cash in return for the execution of a \$250,000 promissory note payable to Electro Technical Corporation. This argument is not supported by the record in this case or the law governing the transaction in question.

At the trial, Mr. Hammons testified that following extensive negotiations the Defendants accepted the Plaintiffs' offer to acquire a 40% interest in the deep test well. As testified to by Mr. Hammons, the agreement of the parties called for the payment by Defendants of \$250,000 in cash and the issuance of a \$250,000 promissory note to Mingo Oil Company for the purchase of the 40% interest. (R. 460-461, ls. 1-25; 1-8).

The clear and unequivocal testimony of Mr. Hammons during the trial established that this decision to convert the prior \$100,000 loan and pay the additional monies was made in the middle of December, 1981. (R. 442, ls. 17-23). Obviously this decision to invest in the oil well had to follow a prior offer by Plaintiffs to sell the 40% interest under those terms.

Not only did Hammons testify that the decision to invest was made in the middle of December, he further testified that acceptance of Plaintiffs' offer was accompanied on December 18, 1981, by partial performance in the form of the conversion of the loan which had been evidenced by the \$100,000 promissory note dated December 1, 1981. (R. 470, ls. 14-15). Upon this expression of assent, which by the admission of Defendants was made on or about December 18, 1981, a contractual obligation was created between the parties. See, B. B. & S. Construction Inc. v. Stone, 535 P.2d 271, 275 N.8 (Alaska, 1975).

At the time the offer to purchase the 40% interest was accepted by the Defendants, they were obligated to pay to Plaintiffs the agreed upon cash payment of \$250,000. (R. 445, ls. 9-21). Therefore, the delivery of the \$150,000 to Plaintiff Strand on December 30, 1981, as partial payment of the purchase price, could not constitute consideration for the execution of the \$250,000 promissory note or his promise to repay the amount of money evidenced by that note.

It is well established law that an agreement to do that which a person is already required to do by contract can not constitute consideration for a new promise. See Baggs v. Anderson, 528 P.2d 141, 143 (Utah, 1974); Boardman v. Dorsett, 685 P.2d 615 (Wash. App., 1984); Hurley v. Hurley, N.M., 615 P.2d 256 (1980); Keil v. Glacier Park, Inc., 614 P.2d 502 (Mont, 1980). Once the Defendants accepted the Plaintiffs' offer to purchase the interest in the oil well they became legally obligated to pay the additional \$150,000 to Plaintiffs. Therefore, as a matter of law, the delivery of the \$150,000 as part payment for that purchase can not constitute consideration for the subsequent execution by Plaintiff Strand of the \$250,000 promissory note. Under the facts presented in the present case, the \$250,000 promissory note is unenforceable for lack of consideration.

The present case is analogous to the case of VanTassell v. Lewis, 222 P.2d 350 (Utah 1950). In that case, the Utah Supreme Court was asked by Plaintiffs to set aside a sale of property to Defendant Lewis. In VanTassell, the Plaintiffs argued that because Lewis had failed to fulfill a promise to them to provide a permanent contract for the purchase of a substitute dairy farm, the Court should undue the purchase by Lewis of Plaintiffs' ranch. In VanTassell, Lewis proposed to purchase the VanTassell ranch for \$10,000 and the assumption of

an \$8,000 note and mortgage in order to facilitate the purchase by the Plaintiffs of a dairy farm.

The VanTassells intended to sell their ranch to raise money to buy a dairy farm which Lewis as a realtor had advertised for sale. Upon payment by Lewis of the \$10,000 the VanTassells endorsed the check back to him and went with him to California to further negotiate for the purchase of the dairy farm. While in California, Plaintiffs signed a preliminary agreement to purchase the dairy farm and Lewis promised to return to California and draw up a permanent contract regarding that purchase. Lewis failed to fulfill this promise and the dairy farm was subsequently the subject of a foreclosure proceeding in which the VanTassells lost their interest.

In denying the relief requested by the VanTassells, the Utah Supreme Court recognized that the contract for the purchase of the ranch by Lewis had been entered into and acted upon by the parties before Lewis promised to obtain the permanent contract for the purchase of the dairy farm. As the Utah Supreme Court explained:

"When Lewis allegedly made his promise, the Plaintiffs were under contract to convey to him the Duchesne property for an agreed price. Under no conceivable theory can the doing of an act which a party is already obligated to do, constitute consideration for a new promise on the part of the other party."

Id., 222 P.2d at 355.

Similarly, in the present case, the Defendants were under contract to deliver to Plaintiffs the \$150,000 for the purchase of the interest in the oil well prior to the time that Plaintiff Strand executed the \$250,000 promissory note. To echo the prior holding of the Utah Supreme Court, in VanTassell, under no conceivable theory can the delivery of that money which the Defendants were already obligated to pay, constitute consideration for the new promise, to wit, the execution of the promissory note and associated promise to repay the \$250,000.

ARGUMENT TWO

THE TESTIMONY OF PLAINTIFF STRAND WHEN PLACED IN CONTEXT DOES NOT SUPPORT THE TRIAL COURT'S DECISION

In the latter part of their first argument, the Defendants refer to the testimony of Plaintiff Strand in support of the trial court's conclusion that the \$150,000 payment constitutes consideration for the promissory note. However, when the referenced testimony is returned to its context it provides no support for Defendants' position.

The Plaintiffs have always contended that the second promissory note in the amount of \$250,000 represented a renewal of the initial \$100,000 obligation and an additional loan of

\$150,000 from Defendants to Mingo Oil Company. (R. 340, ls. 5-9; R. 342, ls. 17-20).¹

While Mr. Strand testified that he had offered to sell 40% of the well in question to Defendants prior to December 30, he testified that no investment decision had been made prior to the delivery of the \$150,000 by Herb Hammons. In fact, Plaintiff Strand testified that the investment offer was accepted by Defendants in mid-February, 1982. (R. 357, ls. 3-6).

Based on this understanding of the factual circumstances involved in this case, Mr. Strand testified that the \$150,000 was partial consideration for the issuance by Mingo Oil Company of the \$250,000 promissory note. He also testified that subsequent to the issuance of that note the Defendants decided to convert the entire debt of \$250,000 into an investment in the deep test well and release Plaintiffs from any and all obligations under the notes. (R. 341, ls. 8-19).

The evidence presented by Mr. Hammons at trial was in direct contradiction to the Plaintiff's testimony and established a factual scenario in which following the Plaintiff's

¹The fact that the second note was for the total amount of the first and second payments to wit, \$250,000, seems so obvious as to bely contradiction. However, Hammons asserted at trial and the trial court obviously believed his testimony that there was no relation between the two obligations.

default under the terms of the initial \$100,000 note, Defendants decided to invest additional money and converted the prior \$100,000 loan into the purchase of a 40% interest in the oil well. Mr. Hammons testified that this decision and part performance of the investment agreement was made on or about the 18 day of December, 1981. Under the Defendants' rendition of the facts this investment decision predated the execution of the \$250,000 note by almost two weeks. Mr. Hammons also testified that at no time did the Defendants loan Mingo Oil Company any money. (R. 487, ls. 19-23).

The trial court obviously did not believe Mr. Strand's testimony and accepted Defendants' representations of the facts as true in granting them judgment on their Crossclaim. The Defendants should not be heard at this time to rely on Plaintiff's testimony concerning facts that were rejected by the trial judge to support their position on appeal.

If Defendants had loaned Plaintiffs \$150,000 on December 30, as testified to by Mr. Strand, that payment would have constituted consideration for the issuance of the promissory note. Defendant Hammons testimony is clear that no such loan was made. (R. 487, ls. 19-23). If as testified to by Mr. Hammons the payment of the \$150,000 was in furtherance of their prior acceptance of Plaintiffs' investment offer then the payment can not constitute consideration for the note.

ARGUMENT THREE

THE DECISION TO CONVERT THE LOAN TO AN INVESTMENT
CONSTITUTED AN ENFORCEABLE ACCORD AND SATISFACTION
RATHER THAN MERELY A CHANGE IN THE "LABEL" USED
TO DESCRIBE THE AMOUNT

In response to Plaintiffs' position that the initial \$100,000 loan was converted into an investment and therefore the note evidencing that loan is unenforceable, Defendants argue that the conversion of the \$100,000 from a debt to an investment "was merely a change in the label used to describe amounts given." This argument is nonsensical and unsupported by the record in this case.

Throughout his testimony, Mr. Hammons reiterated that the parties agreed to convert the initial loan of \$100,000 into an investment in the deep test well. In discussing why the parties converted the loan into an investment, Mr. Hammons explained:

A. . . . it became obvious, or obvious to us, that we not were going to be repaid by the terms of the note (\$100,000) on the 10th, and that the middle of the month came and went and he still didn't have any money, we found out that the security he had given us on this hundred thousand dollars was already encumbered more than the value of the security. We weighted the possibilities of putting additional money in rather than walking away from this or trying to seek its return.

Q. Did you reach some decision about that?

A. Yes, we did. Some further analysis and working with Mr. Wisan and having conversations with

him and repeated conversations with Mr. Strand and his staff, which included a geologist that was on the staff with him, and the private independent or so-called independent information that he had in his office regarding the field we decided maybe we could go ahead and try to make the best out of a bad situation and invest the other money and plus get the tax credit.

(R. 441-442, ls. 25-16), (emphasis added).

Defendants' decision to convert the past due debt into an investment to "try to make the best out of a bad situation" by getting a significant equity interest in an oil well and substantial tax credits can not be characterized as merely a change in the "label" used to describe the amount given. By his testimony, Mr. Hammons admitted that the decision to make the investment in the oil well was made as an alternative to trying to seek the return of the initial \$100,000 loan. This admitted abandonment of Defendants' right to seek the return of the loan and instead "invest" the money in an equity position clearly shows an intent on the part of both parties to do more than merely change the "label" used to describe the amount given.

On several occasions, Mr. Hammons testified that one of the reasons the Defendants decided to make the investment was the opportunity to take advantage of certain favorable tax credits. (R. 451, ls. 5-8). When questioned about the relationship of these tax credits to the conversion of the prior loan Mr. Hammons explained:

Q. Now, if you had loaned the money to Mr. Strand, would you have a tax shelter?

A. No, I don't think so.

Q. So the tax shelter was created by the investment?

A. That is correct.

(R. 451, ls. 14-18)

This testimony points out the Defendants' understanding, at the time the original loan was converted, that the character of that transaction and not simply its label had to be changed for them to take advantage of the favorable tax consequences created by the transaction. And, these tax consequences were one of the primary reasons for entering into the transaction. (R. 451, ls. 5-8).

Therefore, from Mr. Hammon's own admissions all the elements of an enforceable account and satisfaction are established. In substitution of the repayment of the original loan evidenced by the promissory note for \$100,000, Defendants negotiated with Plaintiffs for an equity position in the deep test well. Plaintiffs offered to Defendants a 40% interest in the well for the payment of \$250,000 cash and a \$250,000 promissory note. In December, 1981, Defendants accepted that offer and by converting the prior loan and paying additional monies received the substitute performance, to wit, conveyance of the 40% equity interest. There can be no question that

Defendants decision to accept the Plaintiffs offer constituted an enforceable accord and satisfaction of the initial debt.

Defendants try to get around this evidence of a valid accord and satisfaction by arguing that Mr. Strand was willing to continue guaranteeing the return of the \$100,000 to avoid collection efforts on the loan. Yet in his direct testimony, Hammons admitted that the decision to invest the money previously loaned was an alternative to trying to seek the return of that money or the repayment of the debt. (R. 442, ls. 5-16).

ARGUMENT FOUR

HAMMONS' TESTIMONY CONCERNING AN ORAL AGREEMENT TO REPAY THE MONIES INVESTED DOES NOT ESTABLISH THAT NO ACCORD AND SATISFACTION WAS ENTERED INTO BY THE PARTIES

Hammons did testify at trial that Mr. Strand guaranteed the repayment or return of all monies the Defendants had invested in the oil well.² However, Hammons repeatedly testified that the alleged guarantee agreement was an oral agreement between Mr. Strand and himself and his brother.

Mr. Hammons explained:

A. No, it was a verbal agreement between my brother and myself and Mr. Strand.

²The testimony of Mr. Hammons was in direct contradiction that of Mr. Strand on this issue. Mr. Strand testified that at no time did he guarantee the repayment of 350,000 to the Hammons. (R. 357, l. 16-25).

Q. It was a verbal agreement that Mr. Strand would repay any money that you invested in the deep test, is that what you are saying?

A. That is correct.

(R. 457, ls. 7-12).

Hammons further testified that:

Q. When did you have conversations with Mr. Strand relating to the repayment of all the monies you had paid?

A. After my brother was killed May 9th.

Q. May 9th.

A. I'd say the middle part of May, the end of May.

* * *

Q. Do you recall the substance of the conversation?

A. Well, obviously I would have had a real distaste for what was going on. The well -- he had gotten into all kinds of problems drilling a well, I had lost a brother and a partner, and I didn't want to be in it anymore. And I said, Mr. Strand, if you can pay me the monies we put into this deal back I will walk away no interest, no nothing, and you can have whatever it is -- whatever we've got and he agreed to do that.

* * *

Q. Did he say he would repay that money?

A. Yes, he did.

Q. Do you have a written document where he said he would repay that money?

A. No, I don't.

(R. 472-473, ls. 19-33; ls. 1-8; ls. 16-20).

Thus, taken as a whole, the testimony of Mr. Hammons evidences the fact that Mr. Strand made some oral representation

to him that he would repay the money the Defendants had invested upon a return of their interest in the oil well. And, that testing establishes said representation was made by Mr. Strand long after the investment was made by Defendants.

ARGUMENT FIVE

THEIR WAS A MEETING OF THE MINDS BETWEEN THE PARTIES CONCERNING THE CONVERSION OF THE INITIAL \$100,000 DEBT INTO AN INVESTMENT

In their brief, Defendants argue that Mr. Strand's testimony concerning the issuance of the second promissory note evidences that there was no meeting of the minds as to the alleged accord. Mr. Strand testified that the second note in the amount of \$250,000 was issued for the renewal of the first obligation and the additional loan of \$150,000. As Defendants note in their brief, Mr. Strand testified that Herb Hammons, a principal of Electro Technical Corporation and brother to David Hammons told him that the first note would be destroyed and the second note would include the first hundred thousand dollars and the second hundred and fifty thousand dollars (R. 339, ls. 1-4).

While this testimony conflicts with that of Mr. Hammons, the conflict does not go the issue of the accord. Both Mr. Strand and Mr. Hammons testified that the initial loan of \$100,000 was converted into an equity investment in the deep test well. The only conflict in the evidence relates to when

the loan was converted and not the fact that a substitute performance was intended by both parties.³

If this court was persuaded by the logic of Defendants argument that the existing testimony evidences the lack of a meeting of the minds of the parties, it would have to conclude that there was never a meeting of the minds as to any of the contracts in question. Clearly, the testimony of Messrs. Hammons and Strand is in direct conflict on every critical issue presented in this case except the fact of an offer and acceptance creating the investment agreement and the conversion of the initial loan as partial payment of the purchase price.

ARGUMENT SIX

THE PRESENT APPEAL IS NOT FRIVOLOUS

The arguments presented in both Appellants' initial brief and this reply brief present serious issues of law and fact. Plaintiffs' liability for the \$250,000 promissory note was premised at the trial level upon the mere delivery of the money to Plaintiffs. Yet, if, as admitted to by Defendants,

³Mr. Strand testified that the decision to convert the two loans that were involved in the second promissory note was made during late January or early February 1982. (R. 357, ls. 25-29, ls. 3-6). Mr. Hammons testified that the conversion of the \$100,000 promissory note occurred in the middle of December, 1981. (R. 470, ls. 14-15).

they were obligated to pay that money for their investment in the oil well, then the delivery of the purchase price to Plaintiffs can not constitute consideration for the execution of the note.

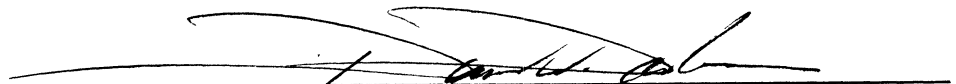
Similarly it is clear from the testimony of the Defendants sole witness, David Hammons, that the initial loan of \$100,000 was converted into an equity investment in lieu of attempting to recover that money or enforcing the promissory note. The testimony of Mr. Hammons, therefore, establishes all the necessary element of an enforceable accord and satisfaction.

These two arguments in themselves render this appeal not frivolous and provide a clear basis for vacating the trial court's judgment.

CONCLUSION

The judgment entered against Plaintiffs for payment of the two promissory notes plus interest and attorneys fees, should be reversed upon appeal, and the Plaintiffs' claims against Defendants remanded to the District Court for a new trial.

Dated this 12th day of November, 1987.



Daniel W. Jackson
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of November, 1987,
I mailed a true and correct copy of the foregoing Reply Brief,
postage prepaid, addressed to the following:

John C. Green
Kim M. Luhn
GUSTIN, GREEN, STEGALL & LIAPIS
48 Post Office Place, 3rd Floor
Salt Lake City, UT 84101

A handwritten signature in dark ink, appearing to read "Kim M. Luhn", is written over a horizontal line.