

2003

John A. Fericks and C. Kurt Hoffman v. Pentad Properties, INC., and Joe Goodman : Brief of Appellee

Utah Supreme Court

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Jeffrey W. Shields; Angela W. Adams; Ballard, Spahr, Andrews & Ingersoll; Attorneys for Appellees.
Russell C. Fericks; Zachary E. Peterson; Richards, Brandt, Miller & Nelson; Attorneys for Appellants.

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IN THE UTAH SUPREME COURT

**JOHN A. FERICKS and C. KURT
HOFFMAN,**

Plaintiffs/Appellants,

vs.

**PENTAD PROPERTIES, INC., and
JOE GOODMAN,**

Defendants/Appellees.

Case No. 20030073-SC

BRIEF OF APPELLEES

**APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE J. DENNIS FREDERICK, DISTRICT COURT JUDGE**

Russell C. Fericks (#3793)
Zachary E. Peterson (#8502)
RICHARDS, BRANDT, MILLER &
NEILSON
Key Bank Tower, Seventh Floor
50 south Main Street
Salt Lake City, Utah 84110-2465

Attorneys for Plaintiffs/Appellants

Jeffrey W. Shields (#2948)
Angela W. Adams (#9081)
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
(801) 531-3000

Attorneys for Defendants/Appellees

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UTAH SUPREME COURT

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**PAT BARTHOLOMEW
CLERK OF THE COURT**

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Key Bank Tower, Seventh Floor
50 south Main Street
Salt Lake City, Utah 84110-2465

Attorneys for Plaintiffs/Appellants

Jeffrey W. Shields (#2948)
Angela W. Adams (#9081)
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
(801) 531-3000

Attorneys for Defendants/Appellees

LIST OF PARTIES TO PROCEEDINGS
IN DISTRICT COURT

Plaintiffs:

John A. Fericks (“Fericks”), and Kurt C. Hoffman (“Hoffman”), Plaintiffs/
Appellants (collectively “Plaintiffs” or “Appellants”).

Defendants:

The Lucy Ann Soffe Trust, Carlos R. Soffe, Vaughn C. Soffe, and Shirla S. Holt
as Trustees of the Lucy Ann Soffe Trust (collectively “Sellers” or “Soffe Defendants”),
and “John Doe Buyer” were each named as defendants below. Plaintiffs/ Appellants
have not appealed the ruling of the district court dismissing the Plaintiffs’ claims against
the Soffe Defendants and the award of attorneys’ fees to the Soffe Defendants. Pentad
Properties, Inc. (“Pentad”), and Joe Goodman (“Goodman”), (collectively “Pentad
Defendants” or “Defendants”), were also named as defendants in the district court.
Goodman and Pentad are the only two defendants that are parties to this appeal as
Appellees.

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JURISDICTION OF THE SUPREME COURT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-3(2)(j) (2002).

ISSUES

Did the district court err in holding that, regardless of the differing versions of fact surrounding the alleged oral modification of the Real Estate Purchase Contract, Plaintiffs' claims for relief under the contract are barred by application of the Statute of Frauds? (Issue preserved in the Record at 84-113, 165-193, 211-251, 284, 322-325).

Standard of Review: The appellate court reviews the district court's legal conclusions for correctness. *Kouris v. Utah Highway Patrol*, 2003 UT 19, ¶ 5, 70 P.3d 72. In doing so, all reasonable inferences will be viewed in the light most favorable to the nonmoving party. *Id.*

Defendants have no objection to Plaintiffs' characterization of the remainder of the issues as stated in Appellants' Brief with two exceptions. First, Defendants object to Plaintiffs' characterization of the district court's holding stated as Issue IIA in the their brief. (Appellants' Brief, p. 1). As stated, the issue calls into question the district court's holding to the extent, if any, that it was based on a clause in the Real Estate Purchase Contract requiring that all modifications to the contract be in writing and signed by the parties. *Id.* There is no support in the district court record for the contention that the district court's holding was based, in any way, on this particular provision of the contract.

(R. at 284, 322-325). Rather, the district court's decision was based on application of the Statute of Frauds, the effect of which was merely reiterated in the parties' contract. *Id.* Because the district court's decision was grounded on application of the Statute of Frauds, and not simply on one provision of the Real Estate Purchase Contract without consideration for the Statute of Frauds, Pentad Defendants take issue with Plaintiffs' position that Issue IIA is now before this Court.¹

Second, Defendants object to the standard of review Plaintiffs apply to the appropriateness of the district court's decision regarding the amount of attorneys' fees awarded to the Pentad Defendants. Although Plaintiffs correctly assert that whether attorneys' fees should be awarded to a particular party is a question of law reviewed for correctness, (Appellants' Brief, pp. 3-4), Plaintiffs fail to mention that the district court has broad discretion in determining the amount of the fee awarded and that the appellate court will review the amount of the award under an abuse of discretion standard. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998) (citing *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988)). Consequently, the determination of whether the district court erred in deciding the amount of attorneys' fees awarded to Pentad Defendants should be reviewed for abuse of discretion, not correctness. *Id.*

¹ Plaintiffs concede in another portion of their brief on appeal that the district court's decision was based solely on application of the Statute of Frauds. Issue III in Plaintiffs' brief questions whether the district court erred in dismissing Plaintiffs' claims "[a]fter ruling the statute of frauds barred any oral modification of the REPC..." (Appellants' Brief, pp. 2-3).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, RULES, AND REGULATIONS**

Utah Code Ann. § 25-5-3 is the determinative statute in this case:

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

STATEMENT OF THE CASE

This action is based on an alleged breach of a contract for the sale of real estate.

Plaintiffs, as putative purchasers of certain undeveloped commercial real property (the “Property”) located in Salt Lake County, brought this action against the Sellers (the Soffe Defendants), of the Property, the Sellers’ real estate agent, and the brokerage which employs the agent. (R. 1-7, 54-60, 89). Plaintiffs sought specific performance of the contract, a standard form Real Estate Purchase Contract (“REPC”), which was signed by the Plaintiffs and the Sellers, and money damages under various tort and fraud based theories against the agents of the Sellers. (R. 1-7, 54-60).

The district court granted motions for summary judgment filed separately and simultaneously by the Soffe Defendants and the Pentad Defendants, based on application of the Statute of Frauds. (R. 88-113, 284, 322-325). In addition, the district court awarded attorneys’ fees to all of the Defendants under a clause in the REPC providing for award of fees. (R. 421-422, 430-434).

Plaintiffs now appeal the district court's orders granting summary judgment and attorneys' fees to Goodman and Pentad, agents for the Sellers of the Property. Plaintiffs are not appealing the summary judgment order dismissing their claims against the Sellers of the Property whose alleged breach is the root of each of Plaintiffs' causes of action below. Plaintiffs are also not appealing the district court's award of attorneys' fees to the Sellers.

STATEMENT OF FACTS

Plaintiffs and the Sellers entered into the REPC on February 1, 2002. Under the REPC, Plaintiffs agreed to purchase the Property from the Sellers. (R. 2, 55, 92). The Sellers, (the Soffe Defendants), were defendants below but are not parties to this appeal. (R. 2, 55) (Appellants' Brief, at i). Goodman represented the Sellers as their real estate agent. (R. 2, 55, 92). Pentad is the real estate brokerage that employs Goodman (R. 2, 55, 92).

Upon execution of the REPC, plaintiffs paid \$5,000 in initial earnest money. Addendum One to the REPC required that Plaintiffs pay an additional \$10,000 deposit of non-refundable earnest money on or before April 6, 2002, when the Plaintiffs, as buyers, were to have completed their due diligence and feasibility study of the Property. (R. 2, 55, 93). The Addendum provided:

Buyer shall deposit with Seller an additional \$10,000 of non-refundable earnest money on or before April 6, 2002. If buyer fails to deliver said earnest money to Seller by April 6, 2002 *Seller may void this contract at its option*. Buyer shall

have until April 6, 2002, to conduct its due diligence and to complete a feasibility study of the site. If Seller has not received written notice from the Buyer of Buyer's desire to void the contract prior to April 6, 2002, then the original \$5,000 earnest money shall become non-refundable.

(R. 14, 82 (italics added, underline in original)).

Sometime in March 2002, Hoffman called Goodman on the telephone and asked Goodman if the Sellers would be willing to grant a one-month extension of the April 6, 2003, additional earnest money deadline. (R. 3, 56, 93). Goodman responded that he did not think that the Sellers would have a problem granting the extension but he would have to ask them before committing to it. (R. 196, 255). Plaintiffs, in both their original and amended complaints, claim that Goodman granted the extension, binding the Sellers, without first informing or obtaining the permission of the Sellers. (R. 3, 56). However, in his affidavit, Hoffman admits that he understood that Goodman would need to discuss the issue with the Sellers before committing to the extension. (R. 196). Specifically, in paragraph 8 of his affidavit, Hoffman testifies that he understood that Goodman "would talk to the seller, Mr. Soffe, about getting the extension." *Id.*

Goodman promptly called the Sellers to ask whether they would agree to extend the additional earnest money deadline. (R. 256). The Sellers refused to grant the extension. (R. 256-257).

Plaintiffs failed to make the April 6, 2002, additional earnest money payment. (R.4, 57, 93, 257). Thereafter, on instruction from the Sellers, Goodman wrote a letter to

Plaintiffs dated April 8, 2002, terminating the REPC due to Plaintiffs' failure to perform. (R. 4, 57, 94, 257-258).

Plaintiffs then brought suit against the Sellers, Goodman, and Pentad requesting specific performance as well as damages for breach of contract and various other tort and fraud based claims. (R. 1-7, 54-60, 94-95). Each of these causes of action depends upon the alleged oral agreement of Goodman modifying the material additional earnest money deadline of the REPC. (R. 1-7, 54-60, 94-95).²

Each of the Defendants moved for summary judgment following the filing of Plaintiffs' Amended Complaint.³ (R. 54-60, 84-113, 127-129, 211-251). The district court granted Defendants' motions and, further, awarded attorneys' fees to each of the Defendants based on the attorney's fees provision in the REPC. (R. 322-325, 430-434). The district court also ordered removal of the Notice of Lis Pendens. *Id.* Subsequent to the removal of the *lis pendens*, the Sellers sold the Property to an independent third-party.

² At the time the Complaint was filed, Plaintiffs also recorded a Notice of Lis Pendens against the property. (R. 61-63).

³ The only difference between the two complaints is that the Amended Complaint adds a damages claim under a provision of the Utah Code governing licensed real estate brokers. The amendment, however, relates only to a measure of damages available under Utah Code Ann. § 61-2-17(4) but fails to state a claim under which the requested damages could be granted. (R. 60).

Plaintiffs appeal only from the order and judgment in favor of Goodman and Pentad. Plaintiffs do not appeal the rulings of the district court in favor of the Sellers of the Property.

SUMMARY OF ARGUMENT

This appeal is moot. Plaintiffs' claims are all based on an alleged oral modification of a written contract between Plaintiffs and the Sellers of the Property. In light of that fact, it is curious that Plaintiffs have not appealed the district court's grant of summary judgment in favor of the Sellers of the Property when the entire dispute centers on the Sellers' alleged failure to perform the contract. Moreover, Plaintiffs' assertion that the Statute of Frauds does not bar their claims to the Property are moot because Plaintiffs' failed to request a stay of the judgment below and the Property has since been sold to a third party.

Regardless, the district court properly held that Plaintiffs' cause of action for specific performance was barred by application of the Statute of Frauds. The alleged oral modification, even if one was made, is unenforceable under Utah Code Ann. § 25-5-3. Because each of the remaining causes of action was ultimately based on the unenforceable alleged oral modification, those claims were also properly dismissed.

The equitable doctrine of promissory estoppel does not provide an exception to the Statute of Frauds in this case. The appellate courts of this state have imposed severe

limits on the use of promissory estoppel to enforce oral agreements otherwise subject to the Statute of Frauds.

The district court properly awarded attorneys' fees to the Pentad Defendants. The REPC provides that, in the event of litigation, the prevailing party shall be entitled to attorneys' fees. The Pentad Defendants were clearly the prevailing parties, having had all claims resolved in their favor. They were also made parties to the REPC through the allegations in Plaintiffs' own pleadings. (R. 54-60). Accordingly, they were entitled to attorneys' fees. Further, the district court did not abuse its discretion in deciding on the amount of fees to which Pentad Defendants were entitled. The amount awarded was properly supported by the record and clearly within the district court's discretion.

ARGUMENT

I. This Appeal is Moot Because Not only are the Sellers not Parties to this Appeal, but the Property in Question has been Sold to a Third Party.

The bulk of the Appellants' Brief in this appeal addresses the Statute of Frauds issues applicable to the failure of the Sellers, who are parties to the REPC, to perform a contract for the sale of real property. This Court does not need address these issues, however, because this appeal is moot. Not only have the Plaintiffs failed to join the Sellers, on whom their remedy depends, in this appeal, but the Sellers of the Property have sold it and the requested remedy is now beyond reach.

A. Plaintiffs' Request for Reversal of the District Court's Grant of Summary Judgment Regarding Enforcement of the Oral Modification is now Moot.

Richards v. Baum, 914 P.2d 719 (Utah 1996), is directly on point. In *Baum*, plaintiffs sought a decree quieting title to certain real property located in Utah County. The defendants also sought to quiet title to the property in their favor. After a trial on the merits, the court quieted title in favor of the defendants. *Id.* at 720. The plaintiffs appealed but did not seek or obtain a stay of the district court's decree. Subsequently, the defendants sold the property to a third party. *Id.* At the appellate level, the defendants moved to dismiss the appeal, "contending that it ha[d] become moot." *Id.* This Court held that "[w]here the issues that were before the trial court no longer exist, the appellate court will not review the case." *Id.* (citing *McRae v. Jackson*, 526 P.2d 1190, 1191 (Utah 1974); *Mikkelsen v. Utah State Tax Comm'n*, 22 Utah 2d 438, 439-40, 455 P.2d 27, 27 (1969)). The *Richards* Court further held that "[t]his court has never held that when an appellant fails to obtain a stay and the property sought is conveyed in good faith to a third party, the appellant is entitled to return to the trial court to have damages awarded if successful on appeal." *Id.* at 721. *See also Kellch v. Westland Minerals Corp.*, 484 P.2d 726 (Utah 1971) (the court was without power to grant any relief to the plaintiff/appellant where the subject matter of the litigation was sold after judgment at the district court level).

The same circumstances exist here. The Property has been sold, and, further, the Sellers of the Property, from whom the essential remedy must be obtained, were not made parties to this appeal.

The fact of mootness is manifest and best illustrated by the relief Plaintiffs request from this Court. Plaintiffs seek an order reversing the summary judgment awarded by the district court. If this Court granted that relief, the case would be remanded to the district court to adjudicate claims against the Sellers for specific performance of a contract to purchase land that no longer belongs to the Sellers. The Sellers were dismissed from the case by the district court with prejudice and cannot be sued again because no appeal was taken from that order. Consequently, a party that is essential to the relief requested cannot be restored as a party litigant. Therefore, at this point in time, it is of no consequence whether an enforceable oral modification was made or whether the Statute of Frauds was properly applied.

It is difficult to ascertain what relief Plaintiffs now seek in raising these issues on appeal. Each of the causes of action of Plaintiffs' Amended Complaint relies on enforcement of the oral modification of the REPC. Otherwise, Plaintiffs would not raise the issue of the oral modification on appeal. Moreover, Plaintiffs do not state, nor have they ever stated, claims against Goodman and Pentad that exist independently of their claimed right to have the benefit of performance of the REPC, which is now impossible in any event. As this Court made clear in *Richards v. Baum*, Plaintiffs cannot uncouple

their damages claims from their underlying claims on the contract against the Sellers, forfeit those claims, and then expect to obtain independent relief in money damages against the Sellers' agents who have no ability to respond in specific performance by delivering title to the Property. Plaintiffs offer no rational explanation for their failure to pursue appeal of the dismissal of the claims against the Sellers or to at least attempt to obtain a stay of enforcement of the district court's judgment. Whatever the reason, they have forfeited their ability to obtain any relief on appeal.

B. Plaintiffs' Request for Reversal of the District Court's Denial of Their Rule 56(f) Request is Likewise Moot.

Plaintiffs' argument that the district court erred in denying their request for additional discovery under Utah R. Civ. P. 56(f) is also premised on their contention that the contract claims asserted below are still at issue on appeal. (Appellant's Brief, pp. 19-22). Plaintiffs describe the facts that they sought to discover and then maintain that "if proven at trial, these facts are sufficient to make the oral agreement enforceable." *Id.* at 22. If that is true, and the district court erred in refusing to allow them to conduct discovery of these facts, which they then prove at trial, the question then becomes one of what they can recover upon enforcement of the oral agreement. The answer is, nothing. The alleged oral agreement cannot be enforced because the Sellers are no longer parties

to this litigation (and cannot be sued again) and, furthermore, they no longer hold title to the Property. Additional discovery cannot overcome the fact of mootness of this appeal.⁴

Plaintiffs admit that their desire to have the district court's ruling refusing their request under Rule 56(f) reversed is so that they can prove that the oral agreement should be enforced. Not only did the district court properly exercise its discretion in denying that relief to Plaintiffs, the point is now moot and need not be adjudicated.

II. The Relief Sought by Plaintiffs is Barred by the Explicit Language of the Statute of Frauds, Utah Code Ann. § 25-5-3.

There is no dispute that this action concerns a contract for the sale of real property. It involves nothing more than a commercial real estate transaction memorialized by an integrated written agreement reached between sophisticated parties experienced in real

⁴ Under Rule 56(f), a court may refuse to grant a motion for summary judgment, if it can be shown "from the affidavits of a party opposing the motion" that he "cannot for reasons stated present by affidavits facts essential to justify his opposition." Utah. R. Civ. P. 56(b). Neither the Plaintiffs nor their counsel filed an affidavit in the district court stating the reasons why the motion for summary judgment should not be granted until discovery has been taken. "A majority of federal cases interpreting an identical Rule 56(f) hold that filing an affidavit is necessary for the preservation of a Rule 56(f) contention that summary judgment should be delayed pending further discovery." *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841 (Utah Ct. App. 1987) (citing *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780 n.4 (3d Cir. 1983)). The Utah Supreme Court has refused to consider an argument that further discovery is necessary when the appellant fails to file a Rule 56(f) affidavit. *Jackson v. Layton City*, 743 P.2d 1196, 1198 (Utah 1987). Because Plaintiffs failed to file a Rule 56(f) affidavit in the district court stating in detail why discovery should be taken, and what facts they sought discover, this argument should be rejected without consideration.

estate transactions dealing with one another at arms length.⁵ For that reason, a simple application of the Statute of Frauds to plain terms of the parties' agreement, which is clearly within the Statute of Frauds, bars all of Plaintiffs' claims as a matter of law.

Several provisions of the REPC are critical to an analysis of the facts presented to this Court.

Addendum One to the REPC imposes an absolute deadline by which Plaintiffs are required to: (1) pay \$10,000 additional, non-refundable earnest money to the Sellers; and, (2) to complete a feasibility study which, according to the Amended Complaint, involved "acquiring approval from the City of South Jordan for the development plan." (R. 14, 56, 82). The Addendum further provided that if the Plaintiffs failed to satisfy these conditions, "Seller may void this contract at its option." (R. 14, 82).

The REPC also contains the following integration clause:

14. COMPLETE CONTRACT: This instrument (together with its Addenda and any attached Exhibits and Seller Disclosures) constitutes the entire contract between the parties and supersedes all prior dealings between the parties. This Contract cannot be changed except by written agreement of the parties.

(R. 80, 12).

⁵ As the REPC shows, Hoffman is, himself, a licensed real estate broker. Hoffman is listed in the REPC as the buyer's agent through his brokerage, Canyon Rim Realty. (R. 10, 78).

A. If an Agreement is Subject to the Statute of Frauds, any Subsequent Modification of the Agreement Must Also Satisfy the Requirements of the Statute of Frauds to be Enforceable.

Plaintiffs devote much of their brief on appeal, and much of their opposition to summary judgment in the district court proceedings, to the proposition that, notwithstanding Paragraph 14 of the REPC, Utah law clearly supports oral modification of a contract even if the contract provides otherwise.

Plaintiffs are correct in their assertion that Utah courts have held, as a general proposition, that oral modifications to contracts can be enforced even if the original writing requires that all modifications must be in writing. However, the line of cases allowing oral modifications of contracts provides no refuge for Plaintiffs. While Utah decisional law holds that parties may orally agree to waive, modify or alter agreements not subject to the Statute of Frauds notwithstanding provisions in contracts similar or identical to Paragraph 14 of the REPC, the law is equally clear that **“if an original agreement is within the statute of frauds, a subsequent agreement that modifies the original agreement must also satisfy the requirements of the statute of frauds to be enforceable.”** *R.T. Nielson Co. v. Cook*⁶, 2002 UT 11, ¶ 13, n.4, 40 P.3d 119, 1124, n.4

⁶ Plaintiffs rely heavily on *R.T. Nielson Co.* in arguing that oral modifications of contracts containing provisions prohibiting such modifications are nonetheless valid. Although *R.T. Nielson Co.* does support that general proposition, it is easily distinguishable from the present case. *R.T. Nielson Co.* involved the oral modification of a contract to provide consulting services, the subject matter of which is not within the Statute of Frauds. 40 P.3d at 1120.

(citing *Golden Key Realty v. Mantis*, 699 P.2d 730, 732 (Utah 1985) (“The rule is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original agreement must also satisfy the requirements of the statute of frauds to be enforceable.”)). *See also, Mills v. Brody*, 929 P.2d 360, 364 (Utah 1996) (Option to purchase real property is within the Statute of Frauds and, therefore, oral extension of the option exercise deadline is not enforceable.).

Because the REPC is subject to the Statutes of Frauds, Paragraph 14 is clearly enforceable since it merely demands compliance with the Statute of Frauds. Contract clauses similar to Paragraph 14 of the REPC and the Statute of Frauds are designed to obviate the very type of dispute that is the gravamen of this action.

B. The Doctrine of Promissory Estoppel is not Applicable to the Undisputed Facts of This Case.

The only writing alleged by the Amended Complaint to exist which memorializes the agreement between the Sellers and Plaintiffs is the REPC, which contains a firm deadline of April 6, 2002, for the payment of additional earnest money and completion of the feasibility study. The allegations of the Amended Complaint, and the basis of each cause of action stated therein, rest entirely on the enforceability of an alleged oral agreement modifying material obligations of a contract to sell real property asserted in violation of both the Statute of Frauds and the terms of the REPC itself.

The Amended Complaint alleges that Plaintiffs justifiably relied on Goodman’s alleged oral representation of an extension of a critical deadline of the written contract

thereby raising, by implication, some variety of promissory estoppel or quasi-contract theory. Indeed, such theories are the only means through which Plaintiffs could possibly argue that their Amended Complaint is not categorically barred by the Statutes of Frauds. This Court, however, has resolved such claims in favor of enforcing the Statute of Frauds and barring equitable theories to the contrary.

For example, in *Stangl v. Ernst Home Center, Inc.*, 948 P.2d 356 (Utah Ct. App. 1997), the Utah Court of Appeals considered the question of whether the doctrine of promissory estoppel bars assertion of, or provides an exception to, the defense of Statute of Frauds where the agreement in issue is otherwise subject to it. The Court, considering facts much more compelling in favor of application of promissory estoppel than those alleged here, rejected the notion of promissory estoppel furnishing an exception to the Statute of Frauds. The Court reasoned that “[a] mere refusal to perform an oral agreement within the Statute [of Frauds], however, is not such fraud as it will justify a court in disregarding the statute [of Frauds] even though it result[s] in hardship to the plaintiff.” *Id.* at 362 (citing *Easton v. Wycoff*, 295 P.2d 332, 333-34 (Utah 1956)). This Court explained its ruling by addressing the issue in the context of formation of a contract:

Fraud generally cannot be predicated upon the failure to perform a promise or contract which is unenforceable under the Statute of Frauds, for the promissor has not, in the legal sense, *made a contract*; and therefore, he has the right, both in law and in equity, to refuse to perform.

Stangl, 948 P.2d at 362⁷ (citing *McKinnon v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 529 P.2d 434, 435 (Utah 1974) (emphasis added). See also, *Homestead Golf Club, Inc. v. Pride Stables*, 224 F.3d 1195, 1202 (10th Cir. 2000) (same).

Consequently, even if Goodman made the oral promise, which he did not, the subject matter of which is, unquestionably, subject to the Statute of Frauds, there is no promise made at all, and no enforcement of it can be imposed. The solution to Plaintiffs' apparent dilemma was prescribed by the *Stangl* court: "A party concerned about the assertion of the Statute of Frauds could easily protect itself by demanding written commitments before acting in reliance on the negotiations." *Stangl*, 948 P.2d at 365.

Plaintiffs' assertion of promissory estoppel as an exception to the rule of the Statute of Frauds, which focuses on *their* reliance on Goodman's alleged statement, analyzes the exception from an opposite, and incorrect, footing. *Stangl* focuses the analysis on the party *asserting* the Statute of Frauds as a defense, holding that "[a] defendant is estopped from asserting the statute of frauds as a defense only when he or she has **expressly and unambiguously waived the right to do so.**" *Id.* at 361 (emphasis

⁷ Plaintiffs themselves cite *Stangl* for the proposition that "a mere promise to execute a written contract and subsequent refusal to do so is insufficient to create an estoppel." (Appellants' Brief, p. 14 (citing *Stangl*, 948 P.2d at 363 (quoting *McKinnon*, 529 P.2d at 436-37))). Likewise, even if Plaintiffs can prove that Goodman promised to execute a written contract, the Sellers' subsequent refusal to allow the modification would not create an estoppel allowing Plaintiffs to recover according to the rule of *Stangl* and *McKinnon*.

added). In this case, no such allegation is made. Defendants have never waived their right to assert the Statute of Frauds as a defense and Plaintiffs do not even attempt to claim that Defendants have done so.

Stangl reiterates the fact that Utah courts “have narrowly circumscribed the application of promissory estoppel to the statute of frauds.” *Id.* at 360-61. As argued at length by Defendants in the district court, *Stangl* does not focus on whether the oral agreement was actually made, but couches the analysis in terms of formation of contract, holding that an oral agreement subject to the Statute of Frauds is never formed in the first instance. (R. 97-98). As the *Stangl* Court aptly noted, “[j]ust as the statute of frauds should not be used to perpetrate fraud[,] so, too, promissory estoppel should not be allowed to eviscerate the statute of frauds.” 948 P.2d at 365 (citing *Medesco, Inc. v. LNS Int’l, Inc.*, 762 F.Supp. 920, 926 (D. Utah 1991)). The *Stangl* Court set forth this principle in the context of denying recovery to a plaintiff relying upon promissory estoppel even though the plaintiff had spent several million dollars in purchasing and preparing a shopping center based on defendant’s promise to be the anchor tenant and lease a portion of the center. The facts of *Stangl* were far more compelling in favor of allowing enforcement of oral contract terms under the doctrine of promissory estoppel as an exception to the Statute of Frauds than those facts surrounding the present dispute. Regardless, the Court held that the plaintiff could not enforce the oral agreement.

C. The Statute of Frauds Prohibits Enforcement of any Oral Modification of the Real Estate Purchase Contract.

This case presents issues nearly identical to those presented to the Utah Court of Appeals in *Mills v. Brody*, 929 P.2d 360 (Utah Ct. App. 1996), and must be resolved in similar fashion. In *Mills*, defendant Brody entered into a lease with an option to purchase Mills' condominium. The agreement required Brody to exercise the option within two years by tendering the purchase price to Mills. *Id.* at 361. Brody claimed to have orally exercised the option within the option deadline but sent a letter to Mills exercising it in writing after expiration of the deadline. Mills refused the exercise of the option, and sued to evict Brody. Brody counterclaimed, demanding specific performance of the option contract. The trial court granted Mills' motion for summary judgment, from which Brody appealed. The Utah Court of Appeals affirmed, and with respect to the alleged oral extension of the written lease/option contract, held:

The trial court determined that the statute of frauds would void any oral modification of the option agreement. The Utah Supreme Court has held: An option to purchase is an interest in real estate and is within the statute of frauds. *An extension* of a contract which is required to be in writing is not enforceable, by the majority rule, in the absence of an estoppel⁸, if it does not comply with the statute of frauds (internal citations omitted). Therefore, the trial court properly determined that *any oral modification* of the option

⁸ *Mills v. Brody* was decided in 1996, one year prior to *Stangl*, which was decided in 1997. As argued above, *Stangl* severely curtailed the estoppel or quasi-contract exception to the Statute of Frauds in real estate cases.

agreement was void under the statute of frauds (internal citations omitted).

Mills, 929 P.2d at 364 (emphasis added).

All of Plaintiffs' causes of action alleged below depend on the occurrence of one event: enforcement of the alleged oral agreement between Hoffman and Goodman modifying an essential, material term of a written contract for the sale of land in violation of both the REPC and the Statute of Frauds. It follows, then, that an agreement that is unenforceable cannot provide the underpinning of any cause of action.

Giving Plaintiffs the benefit of every possible inference, they base their entire set of claims on Hoffman's subjective interpretation of Goodman's oral statements which contradict the REPC itself, the Statute of Frauds, and Hoffman's own understanding, as a licensed real estate agent, of how real estate transactions must be memorialized in writing to be enforceable. In fact, Hoffman admitted in his affidavit to the district court that he understood the importance of securing a writing memorializing the alleged modification. (R. 196). Hoffman stated that he and his partner "had not received the *written extension* which Mr. Goodman had committed to obtain..." (R. 196, ¶ 11 (emphasis added)). Further, Hoffman testified that when he did not receive a written extension, he "was concerned enough to call Joe Goodman because [he] hadn't received the *written extension*..." (R. 196, ¶ 12 (emphasis added)). It is clear from Hoffman's affidavit that even he understood that any modification to the REPC had to be in writing and signed by the parties to be enforceable.

Paragraph 14 of the REPC is unambiguous and lies within an agreement undisputedly subject to the Statute of Frauds. In light of the language of the agreement and the Utah case law holding that modifications to contracts that are within the Statute of Frauds must themselves also satisfy the Statute of Frauds, the district court's grant of summary judgment must be affirmed. Contract clauses like Paragraph 14 of the REPC and the Statute of Frauds exist to avoid this very type of dispute. And Plaintiffs, who are sophisticated, experienced real estate brokers and developers in their own right, cannot, in good faith, object to the enforcement of the express requirements of the Statute of Frauds as applied through the provisions of the REPC.

Notably, the form of the contract at issue in this matter (a standard form Real Estate Purchase Contract) is, as Plaintiffs must readily admit, routinely used in Utah in real estate transactions of this type. As a broker himself, Hoffman is well aware that in real estate transactions, in order to satisfy the Statute of Frauds, all modifications to real estate purchase contracts must be in writing and signed by the parties to be enforceable. (R. 196, Hoffman Aff.). Indeed, a party can "easily protect itself by demanding written commitments before acting in reliance on negotiations." *Stangl*, 948 P.2d at 365. Plaintiffs chose to ignore the standards of the industry by failing to secure a written extension to the REPC. Alternatively, they failed to protect themselves by simply paying the additional earnest money and securing their due diligence and feasibility study before the deadline imposed by the mutually negotiated REPC. As a consequence of Plaintiffs'

failure to comply with one of these options, Plaintiffs are now forced to accept the result of their actions, namely, termination of the REPC.

III. The Payment Deadline Set Forth in Addendum One of the Real Estate Purchase Contract is a Material Term, the Extension of Which Demands a Writing in Compliance with the Statute of Frauds.

Plaintiffs argue that the oral modification of the REPC affects only the payment of some additional earnest money which, in amount, is only 3% of the purchase price, in a contract where closing is nearly a year away. (Appellants' Brief, pp. 14-19). On that basis, Plaintiffs argue that the alleged oral agreement at issue here concerns a non-material term of the REPC and that compliance with the Statute of Frauds is not required of non-material oral modifications.⁹ *Id.* This argument fails for three distinct reasons.

First, the written agreement of the parties defines whether the terms of the agreement are material and whether the timing of performance is important. Paragraph 21 of the REPC provides:

TIME IS OF THE ESSENCE: *Time is of the essence regarding dates set forth in this transaction. Extensions must be agreed to in writing by both parties. Performance under each Section of this Contract which references a date shall be required absolutely by 5:00 P.M., Mountain Time on the stated date.*

⁹ Plaintiffs also argue that the Sellers should have been forced to perform under the contract because Plaintiffs had already partially performed by tendering the first earnest money payment in the amount of \$5,000. (Appellants' Brief, p. 12). However, it is undisputed that the Sellers tendered that money to the Plaintiffs upon cancellation of the contract. (R. 197, 207).

(R. 12, 47) (bold in original; italics added). Recognizing the time-is-of-the-essence provision, the REPC, Addendum One, specifically allows the Sellers to “void this contract at its option” if the additional earnest money is not paid by April 6, 2002. When failure to perform a specific term of a contract allows the other party to **void the entire contract**, the term is, by definition, “material.” *Reno v. Beckett*, 555 F.3d 757, 764 (10th Cir. 1977).

Plaintiffs argue that the payment of the additional earnest money was not material because it comprised such a small amount of the purchase price and because they only sought a one month extension of the deadline. This argument, however, is self-defeating. If the amount of the additional earnest money was merely nominal and one month’s difference in the time of payment would make no difference to any of the parties, as Plaintiffs argue, why then did the Plaintiffs fail to simply make the payment on time? If the amount was so nominal as to not affect the performance of the contract, why did the Plaintiffs fail to make the payment knowing that if they did not, the contract could be voided at the Sellers’ option?

Second, Plaintiffs’ argument that the alleged extension agreement is valid because it modified a non-material term fails because it has no support in Utah decisional law. For example, in *Mills* the Court held that “[a]n extension of a contract which is required to be in writing is not enforceable, in the absence of an estoppel, if it does not comply with the Statute of Frauds (internal citations omitted)... Therefore, the trial court

properly determined that any oral modification of the option agreement was void under the statute of frauds...” 929 P.2d at 364. Further, in *Wardley Corp. Better Homes & Gardens v. Burgess*, 810 P.2d 476 (Utah Ct. App. 1999), the Court held that an extension of time in a listing agreement varies a **material** term of the contract:

The contract attempted to be avoided by oral agreement was a definite contract signed by the defendant that he would pay a commission if the property was sold “before the expiration of this agreement.” The oral agreement was a new contract affecting the time of performance, and, **by substituting a new time of performance, varied an essential term of the written contract.** To hold otherwise would be to nullify the provisions of the statute of frauds with respect to real estate commission contracts.

Id. at 478 (citing *Franke v. Blaire Realty Co.*, 146 N.E. 353, 355 (Ohio 1928) (emphasis added)).

Third, the cases cited by Plaintiffs for their proposition are inapposite. *Allen v. Kingdon*, while holding that “a subsequent agreement that modifies material parts of an original contract must satisfy the statute [of frauds],” made no attempt to quantify or define “materiality” as a matter of law. 723 P.2d 394, 396 (Utah 1996) (internal citation omitted) (holding that failure to perform an oral agreement to paint the front of a house as a condition of purchase did not invalidate contract for purchase of the home). In fact, noting the language cited above, *Allen* supports the proposition that modifications to a contract within the Statute of Frauds must comply with its mandates as well. *Id.* at 397.

Plaintiffs’ citation to *Coulter & Smith v. Russell* suffers from the same infirmity since the issue in *Coulter* surrounded undefined price terms and time-of-performance

terms, the latter of which was subject to scrutiny under the rule against perpetuities. 1999 UT App. 55, 976 P.2d 1218. It is undisputed that price and time-for-performance terms at issue in *Coulter* are material. However, the *Coulter* Court was not called upon to, and did not, in fact, define, “materiality” as a matter of law as it applies to other terms of a contract.

English v. Standard Optical Co., is equally unhelpful in considering the issues before this Court. 814 P.2d 613 (Utah App. 1991). *English* turned on the pedestrian, hornbook concept of whether several related writings can be construed together to form a single writing for purposes of the Statute of Frauds. *Id.* at 616. While the case identifies the material terms of the lease that was the subject matter of the case, which had to be shown to exist among the writings, it did not quantify or qualify “materiality” in any way. *Id.*

In *Reno v. Beckett*, 555 F.2d 757 (10th Cir. 1977), cited by Plaintiffs for the proposition that “oral modification to a non-essential term of contract is enforceable notwithstanding statute of frauds,” (Appellants’ Brief, p. 16), the Court was asked to enforce an alleged oral modification of a deadline in a real estate contract to provide title insurance. The Court refused to do so, and in underscoring the importance of a time-is-of-the-essence provision, noted that “the modification urged by appellants would require the Court to find that time for performance of the contract could be extended by oral agreement, despite the time-of-the-essence provision.” *Id.* at 764. Plaintiffs cite this case

to demonstrate that non-material terms can be modified orally even if the agreement so modified falls within the Statute of Frauds. (Appellants' Brief, p. 16). Although that proposition is stated in the case, the Court explicitly holds that, in light of the time-is-of-the-essence provision in the contract, **a modification of the time for performance of certain conditions of the contract was "material."** *Id.* ("Any contract modification which purports to **extend the time** in which the seller must correct title defects...is a substantial modification of the contract." (emphasis added)).

The contract term allegedly modified here is unquestionably material to the REPC under the very terms of the REPC. Accordingly, any modification of this term would have to have been in writing and signed by the parties to be enforceable under the requirements of the Statute of Frauds.

IV. Disagreement Over the Existence of an Oral Agreement Does not Create an Issue of Material Fact Precluding Summary Judgment.

As a threshold matter, it is important to clarify that the fact that Plaintiffs and Pentad Defendants disagree over whether an oral modification of the contract was created did not preclude the district court from awarding summary judgment based on the Statute of Frauds.¹⁰ *See Rinderknecht v. Luck*, 965 P.2d 564 (Utah Ct. App. 1998) ("Utah courts

¹⁰ What Plaintiffs fail to acknowledge is that the mere existence of a dispute concerning whether an oral modification was made to an agreement which is subject to the Statute of Frauds, regardless of the facts underlying the dispute, invokes, standing alone, application of the Statute of Frauds to defeat the oral agreement.

have not hesitated to grant summary judgment based on the Statute of Frauds.”) For example, in *Strevell-Paterson Co. v. Francis*, 646 P.2d 741 (Utah 1982), the plaintiff argued that summary judgment was inappropriate because it alleged that an oral agreement was reached and the defendant disputed the assertion. In sustaining the entry of summary judgment, the appellate court explained:

Defendant argues that the existence or nonexistence of plaintiff’s oral release of the guarantee constitutes a genuine issue of material fact that prevented the granting of summary judgment. ***Even if an oral release were proven, however, it would be unenforceable as a matter of law under the Statute of Frauds***, which provides that “every promise to answer for the debt, default or miscarriage of another...shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith.” U.C.A., 1953 § 25-5-4(2)...The alleged oral release obviously does not meet those requirements of enforceability. Neither does defendant allege or prove any acts done in reliance on or as part performance of the oral release that would remove it from the operation of the Statute. ***Therefore, the existence or nonexistence of an oral release does not constitute a genuine issue of material fact***, and the trial court correctly held that plaintiff was entitled to judgment on this issue as a matter of law.

Id. at 742 (emphasis added). See also *Wardley Corp. Better Homes & Gardens v. Burgess*, 810 P.2d 476 (Utah Ct. App. 1991) (“Despite the apparent factual dispute as to whether [defendant] did or did not orally agree to an extension of the listing agreement, summary judgment was appropriate because any extension to the listing agreement falls within the ambit of the statute of frauds.”).

This authority makes plain that where the Statute of Frauds is alleged as a defense, disagreement over whether an oral contract was created does not create a genuine issue of material fact precluding summary judgment.

V. The Statute of Frauds Clearly Provides a Basis for Dismissing Plaintiffs Claims of Fraud, Breach of Duty and Intentional Interference with Contract Asserted Against Pentad and Goodman.

Each of the causes of action that Plaintiffs argue should remain viable regardless of the lack of enforceability of the alleged oral modification to the REPC sound in fraud and/or misrepresentation. Each of these causes of action is dependent upon the finding of a single fact, namely, that Goodman made an enforceable oral agreement to extend the earnest money deadline and then failed to honor it. Plaintiffs argue that these causes of action should be reinstated regardless of the disposition of the claims against the Sellers even though they each rely upon a finding that Goodman made the oral modification. This argument is internally inconsistent. If the remaining causes of action rely upon the making of the oral modification, upon which they are each predicated, then a finding that the Statute of Frauds prohibits the oral modification would, likewise, be a finding that each of the remaining causes of action fails as well.

The position taken by Plaintiffs is inconsistent with the pleadings, the district court's ruling, and the law upon which the dispositive motions were based. In order to reverse the district court's judgment on this issue, this Court would not only need to ignore the parties' pleadings, but would have to hold, as a matter of law, that claims of

fraud and misrepresentation premised upon an oral agreement found unenforceable under the Statute of Frauds, can remain viable.

This Court has specifically held an oral agreement found unenforceable under the Statute of Frauds will not support common law fraud claims against the alleged maker of the agreement:

Fraud generally cannot be predicated upon the failure to perform a promise or contract which is unenforceable under the Statute of Frauds, for the promisor has not, in the legal sense, *made a contract*; and therefore, he has the right, both in law and in equity, to refuse to perform.

Stangl, 948 P.2d at 362 (citing *McKinnon*, 529 P.2d at 435 (emphasis added)).

The Plaintiffs cannot enforce the alleged oral agreement for the reasons set forth above. To allow causes of action to proceed against the alleged maker of the oral agreement on any basis after the agreement has been found unenforceable would be to allow Plaintiffs to subvert the effect of the Statute of Frauds and sidestep the ruling of the district court. If every litigant attempting to enforce an oral agreement found to be unenforceable could simply reconstruct the claims by pleading common law fraud or misrepresentation-based causes of action, the Statute of Frauds would be eviscerated.

VI. Goodman and Pentad Were Entitled to the Reasonable Attorneys' Fee Award Granted by the District Court.

A. Defendants Were Entitled to Attorney' Fees Pursuant to the REPC.

Paragraph 17 of the REPC provides:

ATTORNEYS' FEES: In any action arising out of this Contract, the prevailing parties shall be entitled to costs and reasonable attorney's fees.

(R. 12, 47, 336).

The basis for an award of attorney's fees in this case is in the foregoing clause of the contract. The REPC unequivocally provides for an award of attorneys' fees to the prevailing party in any dispute related to the contract. *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 782 (Utah 1994). The Pentad Defendants are unquestionably the "prevailing party" in this action having had all claims resolved in their favor on the merits in the district court.

On appeal, Plaintiffs argue that the district court erred in awarding attorneys' fees to the Pentad Defendants because they are not parties to the REPC. (Appellants' Brief, pp. 28-32).¹¹ However, Plaintiffs' own pleadings contradict this argument. The Amended Complaint seeks relief against the Pentad Defendants for:

1. "breach of statutory and common law standards of care with regard to the rights and interests of Plaintiffs *as third parties to a Real Estate Purchase Contract*;"

¹¹ Plaintiffs, earlier in their brief, adamantly assert that the Pentad Defendants should be liable to Plaintiffs for breach of the alleged modification to a contract to which they now claim the Pentad Defendants are not even parties. Plaintiffs assert liability based on a contract, and simultaneously request that this Court hold that the Pentad Defendants are not parties to the contract in order to find that they are not entitled to attorneys' fees.

2. “intentional interference with the contractual and economic interests of Plaintiffs with regard to the REPC between Soffe and Plaintiffs;” and

3. fraud and/or misrepresentation with regard to allegedly granting an extension of time for payment of an earnest money deposit required under the written Real Estate Purchase Contract.

(R. 57-58, 413-14). The explicit language of the Amended Complaint contradicts Plaintiffs’ current assertion that Defendants cannot recover attorneys’ fees because they were not parties to the REPC.¹²

Plaintiffs argue that the Utah Court of Appeals has ruled that in an action for payment of commission between a real estate agent and his client principal, the real estate agent is not a party to the underlying real estate purchase contract between the buyer and seller and cannot, consequently, invoke the attorney’s fee provision of that underlying contract as a third party beneficiary where there is no listing agreement between the agent and his principal. (Appellants’ Brief, pp. 29-30, citing *Wardley Corporation v. Welsh*, 962 P.2d 86 (Utah Ct. App. 1998)). *Wardley* is clearly distinguishable from this case.

¹² It should also be noted that these terms in the Amended Complaint also belie Plaintiffs’ contention that their tort claims against Pentad Defendants should remain viable regardless of the disposition of the contract claims. The plain language of the Amended Complaint shows that Plaintiffs rely on enforcement of the alleged oral modification of the REPC in asserting the fraud and misrepresentation claims against the Pentad Defendants. *Id.*

In *Wardley*, Young, an agent with Wardley Corporation, a real estate brokerage, approached Welsh, a land owner, and inquired whether Welsh wanted to sell the land. Welsh indicated that he did want to sell the land but did not want to sign an agency agreement with Wardley or Young. 962 P.2d at 87. Welsh orally agreed, however, that if Young found a buyer, Welsh would pay Young and Wardley \$500 per acre for land sold. Young introduced a buyer, Peterson, to Welsh, and Peterson and Welsh entered into a contract and closed a purchase transaction. *Id.* at 88. During this time, Welsh confirmed by letter to Young that Young and Wardley were not his agents. *Id.* The underlying purchase contract provided that “while Wardley BH&G has no agency relationship with neither (sic) the seller nor (sic) the buyer the seller agrees to pay \$500 per acre to Wardley BH&G at settlement.” *Id.* at 87. The underlying contract also contained a prevailing party attorney’s fee provision. *Id.* After the sale was closed, Welsh refused to pay the commission. Wardley sued. Because Wardley had no listing agreement with Welsh, Wardley attempted to bootstrap into the attorney’s fee provision of the underlying Welsh/Peterson contract. Wardley prevailed on part of the case below but was denied attorney’s fees. Wardley cross-appealed on the fee issue. The Court of Appeals held that Wardley was not a party to the underlying contract and could not take advantage of the contract terms under third party beneficiary theory. *Id.* at 91.

This case is markedly different from *Wardley*. First, this is an action by the buyers under the purchase contract against the sellers’ agent, not an action brought by the agent

against his own client for failure to pay commissions owed. Second, the *Wardley* holding is based on the fact that Wardley sued Welsh for a commission in absence of a required written agreement between agent and principal. See Utah Admin. Code R162-6.1.11 (“principal brokers and licensees acting on their behalf shall have written agency agreements with their principals”). It is certainly a sound rule of law that an agent suing his principal for a commission cannot bootstrap into an underlying sales agreement where law requires a specific, and additional, written agreement for payment of the commission between the agent and his principal. But that is not the case here.

Plaintiffs made Goodman and Pentad parties to the REPC through the allegations of the Amended Complaint. They alleged that Goodman, as the Sellers’ agent, had sufficient authority from his principals to fully bind the Sellers to a modification of the written contract allegedly agreed to by Goodman, without even asking the Sellers for permission. It is anomalous for Plaintiffs to now argue that Goodman acted in a way to fully bind his principal to a modification of the REPC yet, when the chips are down, argue that Goodman and Pentad are strangers to the contract. In other words, the allegations of the Complaint engrafted Pentad and Goodman onto the principal party status of the Sellers in the underlying contract for purposes of a fee award.

B. Defendants are not Required to Allocate Their Fees Because They Prevailed on all Causes of Action, and All Causes of Action Were Predicated on the Real Estate Purchase Contract.

Plaintiffs argue that Utah law requires parties applying for an award of attorneys’ fees to allocate those fees between work performed on causes of action they have

prevailed upon and work performed upon causes of action that they did not prevail upon, and because Pentad Defendants failed to allocate, they should be barred from recovering fees.

Though it is true that Utah courts have adopted the rule that “a party seeking [attorney] fees must allocate its fee request according to its underlying claims,” *Pack v. Case*, 2001 UT App. 232, ¶ 37, 30 P.3d 436, allocation is not required where all causes of action were dismissed based on a common defense.

Plaintiffs brought six causes of action against the Defendants. The Defendants moved to dismiss or, alternatively, for summary judgment, on the single theory that the alleged oral agreement is barred by the Statute of Frauds and because all causes of action depend on the enforceability of the underlying oral agreement, all must be dismissed. The district court adopted that argument in its August 19, 2002, summary judgment ruling. (R. 284). Indeed, the district court’s recognition that all causes of action were defeated by a common defense was amply illustrated when it denied the Plaintiffs’ objection to the Pentad Defendants’ proposed form of Order on Summary Judgment. (R. 322-25). Plaintiffs argued that the Court’s ruling that the alleged oral agreement was unenforceable affected only three of the six causes of action. Defendants argued that the inability to enforce the oral agreement was the common thread defeating all causes of action, a point with which the district court agreed in entering the Order.

The purpose of the rule of allocation is to compel parties applying for attorney's fees to allocate between causes of action upon which they prevailed and causes of action upon which they did not prevail. Here, the rule is inapplicable. Defendants prevailed against all causes of action based on a common defense. Therefore, if Defendants are to allocate, the allocation is one-hundred percent to time spent and fees incurred pursuing the common defense.

C. The District Court did not Abuse its Discretion in Determining the Amount of Attorneys' Fees Awarded to the Pentad Defendants.

As evidence of the amount of attorneys' fees and costs claimed by the Pentad Defendants, Defendants submitted the affidavit of their lead counsel, Jeffrey W. Shields, Esq., (R. 340-43), setting forth the hours devoted to resolution of the claims, the hourly rate charged for each of those hours, and the usual and customary rates for such work. This affidavit mirrored the requirements for such affidavits under to Utah law. *Cottonwood Mall Co. v. Sine*, 830 P.2d 266 (Utah 1992). Mr. Shields' affidavit sets forth the name and billing rate of each of attorney or staff member who worked on this case as well as detailing the number of hours spent on the matter. (R. 341-42). Mr. Shields attached to his affidavit a copy of the billing records from each of his firms detailing not only the time spent on the matter but also setting forth a description of the work completed. (R. 347-61). Mr. Shields' affidavit states that the services rendered in connection with his representation of the Defendants was reasonable and necessary to the representation. (R. 342, 343). Mr. Shields also states that the rates charged by the

attorneys who worked on this matter are reasonable and customary in the Salt Lake County legal community considering their experience and expertise. (R. 342, 343).

Plaintiffs argue that the complexity and length of the litigation do not warrant fees in the amount awarded to Pentad Defendants. (Appellants' Brief, pp. 34-40). Further, Plaintiffs contend that the litigation was "non-complex litigation involving no discovery." *Id.* at 36. However, because of Plaintiffs' tactics in litigating this matter at the district court level, far more attorneys fees were accrued than would otherwise have been necessary. For instance, Plaintiffs contend that the litigation involved no discovery. But this is true only because Defendants were not required to actually answer Plaintiffs' discovery requests. Plaintiffs, in fact, attempted to force Defendants to answer discovery requests and submit to depositions before any attorneys' planning meeting had taken place and before initial disclosures were given by either side. (R. 285-290).

Accordingly, Defendants accrued attorneys' fees that would otherwise have been unnecessary in filing a Motion for Protective Order. (R. 285-290, 353-54). Additionally, Plaintiffs filed an Amended Complaint after Defendants had filed a Motion to Dismiss but before Defendants' motion had been ruled on. This forced Defendants to continue to pursue their motion to dismiss while trying to obtain summary judgment on Plaintiffs' Amended Complaint. Pursuing both motions at the same time caused Defendants to accrue additional fees that would have been unnecessary if not for Plaintiffs' conduct. In

short, Plaintiffs attempts to litigate this matter caused Pentad Defendants to accrue many of the fees that Plaintiffs now deem “simply breathtaking.” (Appellants’ Brief, p. 36).

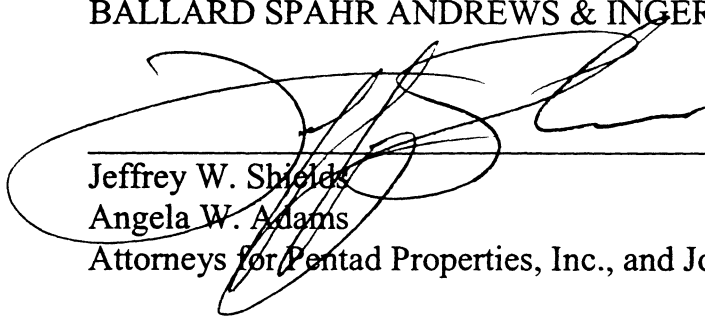
Based on the information submitted to the district court in support of this request for award of fees, the district court did not abuse its discretion in granting the motion for fees, and awarding the amount of fees requested.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court’s order granting summary judgment to the Pentad Defendants and awarding to them their attorneys’ fees.

RESPECTFULLY SUBMITTED this 28th day of August 2003.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP



Jeffrey W. Shields
Angela W. Adams
Attorneys for Pentad Properties, Inc., and Joe Goodman

CERTIFICATE OF SERVICE

I hereby certify that, on the 28th day of August 2003, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES** to be mailed via first-class mail, postage prepaid, to the following:

Russell C. Fericks (#3793)
Zachary E. Peterson (#8502)
RICHARDS, BRANDT, MILLER &
NEILSON
Key Bank Tower, Seventh Floor
50 south Main Street
Salt Lake City, Utah 84110-2465

Attorneys for Plaintiffs/Appellants

