

1989

## Marcy G. Myers v. Darlene Stout (Copple) : Petition for Writ of Certiorari

Utah Supreme Court

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**UTAH SUPREME COURT  
BRIEF**

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890024

**IN THE SUPREME COURT OF THE STATE OF UTAH**

MARCY G. MYERS,

Plaintiff-Petitioner,

V.

DARLENE STOUT (COPPLE),

Defendant-Respondent.

Court of Appeals No. 860279

Lower Court No. C 82 5014

Category 13

890024

**PETITION FOR WRIT OF CERTIORARI**

Petition for writ of certiorari to review  
a decision of the Utah Court of Appeals

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**FILED**

JAN 23 1989

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MARCY G. MYERS,

Plaintiff-Petitioner,

V.

DARLENE STOUT (COPPLE),

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

MARCY G. MYERS,

Plaintiff-Petitioner,

V.

DARLENE STOUT (COPPLE),

Defendant-Respondent.

Court of Appeals No. 860279

Lower Court No. C 82 5014

Category 13

**PETITION FOR WRIT OF CERTIORARI**

Petitioner herewith petitions the Supreme Court of Utah for writ of certiorari to the Court of Appeals of the State of Utah to review the unpublished decision of the Court of Appeals filed in the above matter.

**QUESTIONS PRESENTED FOR REVIEW**

1. Whether the trial court's finding that "[d]uring the summer of 1978 Mrs. Stout discussed the sale of the home with Mr. and Mrs. Smith, and both agreed it would be sold to Mrs. Stout.", is sufficient to support a judgment quieting title to the home in defendant where 1) title to the home was in Mr. and Mrs. Smith jointly, at the time 2) Mr. Smith and Mrs. Stout entered into a uniform contract whereby Mr. Smith agreed to sell, and Mrs. Stout agreed to buy the home, and (3) Mrs. Stout claims the interest of Mrs. Smith under an oral contract partly performed.

2. Whether the trial court's findings that "Mrs. Stout made the down payment and the initial monthly payments of \$788.00 to Alvin Smith. Thereafter checks were made payable to Al and Sandra Smith which Sandra Smith endorsed and deposited in a joint bank account. Thereafter Mrs. Stout made payments directly to Tracy Mortgage on the loan for the property. Said loan was in the names of Sandra and Al Smith.", support the trial court's conclusion of part performance, and the judgment quieting title in defendant, where the terms of the oral contract are not shown in the record or found by the trial court, and such payments were made pursuant to and were required by the written uniform contract executed by Mrs. Stout and Mr. Smith.

3. Whether the trial court's findings that "Mrs. Smith acquiesced in the sale and agreed to the sale by showing Mrs. Stout through the home and discussing the purchase price of \$97,500.00.", and "[t]hereafter checks were made payable to Al and Sandra Smith which Sandra Smith endorsed and deposited in a joint bank account.", support the conclusions of law that there was an enforceable oral agreement and the checks satisfied the statute of frauds, and whether said findings and conclusions support the judgment.

4. Whether the trial court's findings that "Sandra Smith orally agreed to the sale and acquiesced in the sale to Stout and knew the sale was for the entire parcel of property."

"[d]uring the summer of 1978 Mrs. Stout discussed the sale of the home with Mr. and Mrs. Smith, and both agreed it would be sold to Mrs. Stout.", "Mrs. Smith acquiesced in the sale and agreed to the sale by showing Mrs. Stout through the home and discussing the purchase price of \$97,500.00.", and ". . . checks were made payable to Al and Sandra Smith which Sandra Smith endorsed and deposited in a joint bank account.", support the trial court's conclusion of ratification by Mrs. Smith of the uniform real estate contract between Al Smith and Mrs. Stout, and the trial court's judgment quieting title.

5. Whether the claim of "oral contract" asserted in defense of a partition proceeding is subject to the statute of limitations.

#### COURT OF APPEALS OPINION

The decision of which review is requested is unpublished. It is re-printed and included in the addendum hereto.

#### STATEMENT OF JURISDICTION

A. Date of entry of decision sought to be reviewed:  
November 9, 1988;

B. Date of order respecting a rehearing: December 21, 1988.

C. Statutory provision conferring jurisdiction on the Supreme Court to review the decision by a writ of certiorari:  
Utah Code Anno: § 78-2-2(5), 1988.



### CONTROLLING STATUTES

Statute of frauds, §§ 25-5-1, 3, and 8, Utah

Code Annotated, 1953, as amended.

§25-5-1. Estate or interest in real property. No estate or interest in real property . . . shall be created granted, assigned, surrendered or declared otherwise than . . . by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

§25-5-3. Leases and contracts for interest in lands. Every contract 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 . . . sale is to be made, or by his lawful agent thereunto authorized in writing.

§25-5-8. Right to specific performance not affected. Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

### STATEMENT OF THE CASE

Petitioner's predecessor in interest brought partition proceedings in the lower court. Defendant-respondent filed her amended answer in which no counterclaim was included. Oral contract, estoppel, and ratification were among the defenses pleaded in the amended answer. The lower court rendered judgment in defendant's favor which quieted the title to the entire property in defendant. The judgment gives no indication what interest in the real property was confirmed or extinguished. The Court of Appeals affirmed and denied rehearing.

The property consists of a home on a single lot which, prior to July 21, 1978, belonged to Alvin R. Smith and Sandra Smith, husband and wife, as joint tenants (Tr. Vol III pp.

6-7, 14-15, 22; Exhibit 16-P). On April 26, 1976 they jointly executed a trust deed to Tracy Collins Bank which required installment payments. The trust deed was current at the time of trial. (Tr. Vol. VII pp. 10-13; Exhibits 24-D and 25-D). On July 21, 1978 "Al Smith Const. Co. by Alvin R. Smith" executed a uniform contract for the sale of the property to defendant-respondent (Tr. Vol. II pp. 3-4; Tr. Vol. VII p. 90; Tr. Vol. IX p. 5; Exhibits 1-D, 12-P). Payments of \$25000, \$500, and \$5000 were made by defendant to Alvin R. Smith (Tr. Vol II pp. 59-61). The payment for August 1, 1978, and those made thereafter until April 20, 1979 were made to Alvin R. Smith (Tr. Vol. VII pp. 43-45).

The check issued for an April 20, 1979 payment was made to "Alvin and Sandra Smith" and was endorsed by both. The check was for "Mortgage payment to date for 4120 Donibristle Road." (Tr. Vol. VII pp. 41-43, 45; Exhibit 4-D). On April 18, 1979 defendant recorded a Notice of Interest in which she declared her interest in the property to be "evidenced by a certain Uniform Real Estate Contract dated July 21, 1978, by and between Al Smith Construction Company as Seller, and the undersigned Darlene Stout as buyer." (Exhibit 18-P)

Defendant's check for a May 8, 1979 payment was issued to "Alvin and Sandra Smith." The check was endorsed by Sandra for both payees. (Tr. Vol VII p. 47; Exhibit 38-D).

The June 5, 1979 check was to "Sandra & Alvin Smith

Const." Sandra provided the only endorsement. The check was noted as payment for "Mortgage to Date on Above Address [4120 Donibristle Road, South Jordan, Utah 84065]." (Tr. Vol. VII p. 46; Exhibit 37-D).

The check for the July 5, 1979 payment was to "Al and Sandra Smith," with notation "Mortgage to Date." It was endorsed only by Sandra. (Tr. Vol. VII p. 47; Exhibit 39-D).

The check for the September 5, 1979 payment was to "Al & Sandra Smith" and was noted for payment of "Contract to Date House above [Jack or Darlene Stout 4120 Donibristle Road, South Jordan, Utah 84065]." It too was endorsed by Sandra only. (Tr. Vol. VII p.48; Exhibit 41-D).

The check for October 1, 1979 was payable to "Al & Sandra Smith," with notation "Paid to Contract to Date 4120 Donibristle," and was endorsed "Al & Sandra Smith" by Sandra only. (Tr. Vol. VII pp. 47-48; Exhibit 40-D).

The November 7, 1979 check was payable to "Al & Sandra Smith" with notation "Paid to Contract," and was endorsed by Sandra Smith "For Deposit Only Al & Sandra Smith." (Tr. Vol. VII pp. 48-50; Exhibit 42-D).

The December 5, 1979 check was to "Al & Sandra Smith," with notation "Contract to Date," and was endorsed by Sandra Smith as follows: "Al & Sandra Smith." (Tr. Vol. VII pp. 50-51; Exhibit 43-D). The January 1, 1980 check was to "Al & Sandra Smith" with notation "Contract to Date," and was

endorsed by Sandra "Al and Sandra Smith By Sandra H. Smith."  
(Tr. Vol. VII p. 49; Exhibit 44-D).

The checks payable to Al and Sandra Smith were for \$788.00 which is the amount of the monthly payments due on the Al Smith/Mrs. Stout uniform contract. For the remainder of 1980, and thereafter, defendant made the mortgage payments directly to the mortgagee. (Tr. Vol. VII pp. 55-59; Exhibit 7-D).

When asked "Isn't it true that you started putting Sandra Smith's name on the checks because you had been told by someone that she hadn't signed the contract and you needed to do that to involve her?", defendant answered, "No, Sandra told me to put her name on the checks . . . [s]o that she [Sandra Smith] could take care of her business. She said she had to run them through her books." (Tr. Vol. VII p. 72-73).

On December 31, 1980 Sandra conveyed her interest in the property to a Utah corporation. The deed was dated and recorded that day. (Tr. Vol. III p. 18; Exhibit 19-P).

Defendant Stout did not request Sandra Smith to execute the July 21, 1978 uniform contract at any time before or at the time of its execution (Tr. Vol. II p. 20); and Sandra did not comply with defendant's requests made thereafter to sign the uniform contract. (Tr. Vol. II pp. 17-21; Tr. Vol. VII pp. 59, 95-96).

In January, 1982 Alvin R. Smith d/b/a Al Smith Construction Company, by warranty deed delivered to and accepted by defendant, conveyed a one-half undivided interest

in the property to defendant Stout. The deed was recorded by defendant on September 9, 1983. (Tr. Vol. II pp. 55-56; Exhibit 11-D).

There is no testimony in the record that tends to establish an oral contract partly performed for the sale by Sandra of her one-half undivided interest in the property to defendant. Defendant's case in that regard cannot be any stronger than the evidence she introduces in support of the claim. The sum total of that evidence is the defendant's, and the defendant's daughter's testimony as to what was stated by Sandra in the course of their alleged dealings. Defendant testified Sandra said "And since [defendant's] husband worked for Al [Smith] as an agent, that she [Sandra] was delighted that . . . we would move in there if we did . . ." (Lines 21-23, Tr. Vol. II p. 16). "They'd [Al and Sandra Smith] let the pool table go with the house. . ." (Lines 22-23, Tr. Vol. VII p. 28). "She [Sandra] said that the purchase price at that time was ninety-seven five. . . [and] she was desperate to sell it." (Lines 8-11, Tr. Vol. VII p. 29). Defendant responded that she, defendant ". . . liked [Sandra's] home and that in the event my [defendant's] home sold that I would be interested." (Lines 16-19, Tr. Vol. VII p. 29). According to defendant, Sandra then said ". . . well, . . . we can work it out." (Lines 20-21, Tr. Vol. VII p. 29). "She wanted to sell the house. . . . ninety-seven five was the price." (Lines 5-6, 8, Tr. Vol. VII p. 35). "I'm [Sandra] very glad that you are buying it because your

husband works with Jack [Stout] and . . . you're really going to love it." (Lines 9-12, Tr. Vol. VII p. 62).

Deanna Copple, defendant's daughter, testified Sandra made statements in her presence that "she [Sandra] was real anxious to sell the home. . . (Lines 7, 12-13, Tr. Vol. VII p. 77)" That "the purchase price was almost a hundred thousand." (Line 17, Tr. Vol. VII p. 78). And that she never heard her [Sandra] say that she was not going to sell her interest in the home to her mother. (Lines 16-19, Tr. Vol. VII p. 83).

To demonstrate that there was no evidence to support the trial court's finding of fact which is designated a conclusion of law that "Sandra Smith orally agreed to the sale. . .", in her opening brief in the Court of Appeals petitioner set out verbatim, quoted and marshalled, the evidence in the record of oral communications between Sandra Smith and defendant from which it is self-evident that no oral agreement occurred. The Court of Appeals held "Basically, the trial Court found that Stout purchased the entire parcel of real property involved in this dispute pursuant to (1) a uniform real estate contract with Al Smith and (2) certain oral representations and other actions of Sandra Smith" but that "Myers has failed to marshall the evidence and demonstrate its insufficiency and, therefore, we reject her challenge to the trial court's findings of fact. Given these findings, the trial court's judgment is correct."

### ARGUMENT

By way of introduction to this part, the issue before the Court of Appeals was whether the judgment was supported by the facts; appellant's formulation of the issue there was to postulate the judgment as not having support in the evidentiary facts as well as the facts as found by the trial court if in fact the trial court found on material facts.

The finding that ". . .Mrs. Stout discussed the sale of the home with Mr. and Mrs. Smith, and both agreed it would be sold to Mrs. Stout" and the statements attributed to Sandra Smith that "she was delighted that we would move in if we did", "the purchase price at that time was ninety-seven five and she was desperate to sell it", (and defendant's response that she "would be interested"), that "we can work it out", "I'm very glad you are buying it because your husband works with Jack", to establish an oral arrangement does not indicate agreement as to all terms and conditions but at best an agreement to reach an agreement in the future which is of no effect and imposes no obligation on the parties. *Zappa v. Basden*, 373 S.E.2d 246 (Ga.App.1988). Therefore, the finding that "both [Mrs. Stout and Mr. and Mrs. Smith] agreed it would be sold to Mrs. Stout", implying an agreement to reach an agreement in the future, does not support the judgment. (See issue 1., Questions Presented for Review).

The quiet title judgment does not exhibit any independent

title, nor any right or interest which the judgment converted to title. If it appeared from the judgment that defendant's claim was founded in fact upon an oral contract partly performed and the judgment confirmed the same and extinguished petitioner's adverse claim, the judgment would have connected itself with the title. State, etc. v. Santiago, 590 P.2d 335 (Utah 1979).

"It would be a departure from settled rules to hold that an ordinary judgment in an action to determine adverse claims to land, obtained by a total stranger to the title . . . operates to transfer title, or constitutes a link in the chain of title, and . . . admissible in evidence as such against the true owner." Minnesota Debenture Co. v. Johnson, 94 Minn. 150, 102 NW 102 (1905).

In the instant case there is no indication in the judgment as to how and when defendant acquired an ownership interest in Sandra Smith's one-half interest in the property.

It is not sufficient in order that the judgment be supported by the facts that the conclusory finding of oral agreement, a conclusion of law in this context, be made without more. Clear, definite, and mutually understood terms must be found (Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101 [1959], and Holmgren Brothers, Inc. v. Ballard, 534 P.2d 611 [Utah 1975] which are based upon clear unequivocal and definite testimony, or other evidence of the same quality. So it would follow that if the agreement to be confirmed by the judgment and petitioner's interest extinguished then there must be evidence introduced and findings made regarding completed performance of the clear,



definite and mutually understood terms by the contracting party in the absence of which the judgment is not supported by the facts and in this instance, by the "facts" as found by the trial court.

ARGUMENT AS TO QUESTION NO. 1

What has been said before in the argument section of this petition is applicable here.

A judgment is a link in the chain of title only where it transfers title or renders valid a particular link in the chain of title which without the judgment would be defective or invalid. Minnesota Debenture Co., supra. Defendant's judgment is therefore without adjudicatory effect.

In formulating the issues for the trial court defendant's counsel stated:

"She [Sandra Smith] was actually part of the contract and orally participated in it, was a part of all of it; and that her oral contract was made as of this written agreement [uniform real estate contract of July 21, 1978]." Tr. Vol. III p. 8.

It therefore is not clear from anything in this case whether the defendant's claim is based upon an oral agreement partly performed or an oral ratification of the uniform contract.

In either case, the facts do not support the judgment as a matter of law for the reasons following.

The uniform contract between defendant and Al Smith only operates to transfer Al Smith's interest in the property. Texas American Bank/Levelland v. Morgan, 733 P.2d 874 (N.M. 1978); Handy v. Shiells, 2325 Cal.Rptr. 543 (Cal.App. 1Dist.

1987). After the contract defendant and Sandra Smith are tenants in common. Nelson v. Davis, 592 P.2d 594 (Utah 1979) and Tracy Collins Trust Co. v. Goeltz, 5 Ut2d 350, 301 P.2d 1086 (1956). Al Smith could not bind Sandra to the contract. Carbine v. Meyer, 126 Cal.2d 386, 272 P.2d 849 (1954), and there is no husband-wife exception to the statute of frauds. Williams v. Singleton, 723 P.2d 421 (Utah 1986). Only a written power of attorney will authorize one to bind another to a contract for the sale of real property. Cady v. Johnson, 671 P.2d 149 (Utah 1983).

In order that defendant have the one-half interest of Sandra Smith there must have been either an oral contract partly performed or a ratification of the Al Smith-Mrs. Stout uniform contract in the absence of a conveyance that would satisfy the statute of frauds.

Defendant's conclusion number 2, that Sandra Smith orally agreed to the sale and acquiesced in the sale to Stout and knew the sale was for the entire parcel of property, cannot support a judgment for there can be no oral ratification of a contract for the sale of real property (Bradshaw v. McBride, 649 P.2d 74 [Utah 1982]), and our court in Coombs v. Ouzounian, 465 P.2d 356 (Utah 1970) held acquiescence not to overcome the bar of the statute of frauds.

Finding of fact number 6, Mrs. Smith acquiesced in the sale and agreed to the sale by showing Mrs. Stout through the home and discussing the purchase price of \$97,500.00

also cannot support the judgment. In Gregerson v. Jensen, 669 P.2d 396 (Utah 1983), where the wife participated in the conversations leading up to the delivery of the check "she signed nothing" and in that "she has never signed any writing sufficient to satisfy the statute of frauds obligating her to sell her property to the buyers, there was, as the district court held, no basis for a decree of specific performance against the sellers."

#### ARGUMENT AS TO QUESTION NO. 2

The trial court's findings referred to in question 2 are as to the payments made by defendant under her contract with Mr. Smith. In order to constitute "part performance" the payments must be exclusively referable to the oral contract sought to be enforced. Downtown Athletic Club v. Horman, 740 P.2d 275 (UtahApp 1987). In that the payments are not in any way referable to an oral agreement partly performed the findings cannot, in law, support the judgment

#### ARGUMENT AS TO QUESTION NO. 3

The trial court's finding that checks were made payable to Al and Sandra Smith which Sandra Smith endorsed and deposited in a joint bank account and conclusion that the checks made to Sandra Smith constitute writings referable to her agreement satisfying the Statute of Frauds also do not support the judgment for the reason the checks are not exclusively referable to "her agreement", Downtown Athletic Club, supra, and in order

that a written agreement of memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the agreement of the parties; every official element of the contract must be expressed in writing. Zappa v. Basden, 373 S.E.2d 246 (Ga.App. 1988); Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P.2d 578 (1952). And of perhaps greater importance is the undisputed fact that neither Mrs. Stout nor Sandra Smith intended Sandra Smith's endorsement to "involve her" with the contract. (Tr. Vol. VII p. 72-73).

#### ARGUMENT AS TO QUESTION NO. 4

Petitioner's argument respecting question 4 is contained in the above introduction and arguments which are incorporated in this part.

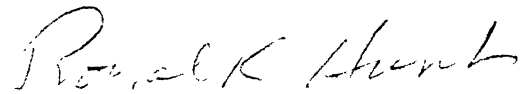
#### ARGUMENT AS TO QUESTION NO. 5

Petitioner injected the defense of the statute of limitations against the defendant's claim of oral contract which was pleaded in defense. The Court of Appeals held Utah Code Ann. § 78-12-25 (1988), on which Myers relies, only concerns the time within which an action to enforce an oral contract may be brought. It does not affect Stout's ability to raise the contract in defense to an action brought against her.

If the matter pleaded in defense has the nature and character of an independent action and does not constitute a pure defense the general rule is that the statute applies.

54 C.J.S., § 38 Limitations of Action, p. 76. The enforcement of an oral contract has the character of an independent action.

DATED January 23, 1989.

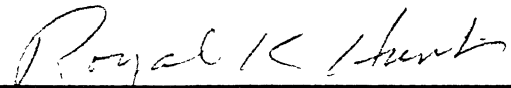
A handwritten signature in cursive script, reading "Royal K. Hunt".

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ROYAL K. HUNT

PROOF OF MAILING

Four copies mailed to Carl J. Nemelka, 75 North Center  
American Fork, Utah 84003 on January 23, 1989.

A handwritten signature in cursive script, reading "Royal K. Hunt".

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ROYAL K. HUNT

## **APPENDIX**

Copies of:

MEMORANDUM DECISION, Utah Court of Appeals

ORDER DENYING PETITION FOR REHEARING,  
Utah Court of Appeals

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
Third District Court

ORDER AND JUDGMENT  
Third District Court

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Marcy G. Myers,  
Plaintiff and Appellant,  
v.  
Darlene Stout, et al.,  
Defendants and Respondent. )

MEMORANDUM DECISION  
(Not For Publication)

Case No. 860279-CA

FILED

Before Judges Billings, Greenwood, and Orme.

ORME, Judge:

NOV 9 1988  
*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

Myers appeals from the trial court's judgment quieting title to a parcel of real property in Stout. Myers states in her brief that the sole issue on appeal is "[w]hether the judgment is supported by the facts." We conclude that it is and affirm.

The trial court's findings of fact and conclusions of law in this case are very detailed. Basically, the trial court found that Stout purchased the entire parcel of real property involved in this dispute pursuant to (1) a uniform real estate contract with Al Smith and (2) certain oral representations and other actions of Sandra Smith. "To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). See Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Myers has failed to marshal the evidence and demonstrate its insufficiency and, therefore, we reject her challenge to the trial court's findings of fact. Given those findings, the trial court's judgment is correct.

Despite Myers' assertion that the sole issue on appeal is whether the judgment is supported by the facts, she attempts to

raise several other issues in her brief. The argument section of Myers' brief consists of five pages, only one of which is dedicated to the sole issue on appeal as she identified it. The remaining four pages of argument touch briefly on merger, the statute of limitations, part performance, and the statute of frauds. This discussion is disjointed and otherwise difficult to follow. See R. Utah Ct. App. 24(k)(briefs must be concise, accurate, and logically arranged). See also Demetropoulos v. Vreeken, 754 P.2d 960, 961 (Utah Ct. App. 1988). We likewise need touch upon these legal doctrines only briefly.

We first reject the statute of limitations argument offered by Myers. Utah Code Ann. § 78-12-25 (1988), on which Myers relies, only concerns the time within which an action to enforce an oral contract may be brought. It does not affect Stout's ability to raise the contract in defense to an action brought against her.

We reject the part performance and statute of frauds arguments, as they are premised upon a misconstruction of the trial court's findings. ~~The court held an oral contract existed between Sandra Smith and Stout, and that this contract had been partially performed through Stout's payments, some of which were made with checks payable to Sandra Smith which she accepted, endorsed, and cashed.~~ Myers' argument is premised on the invalidity of these findings, which has not been shown.

Finally, we reject the merger argument as that doctrine is inapplicable given the trial court's findings. The deed to Stout expressly conveys only Al Smith's interest in the property and only a contract pertaining to his interest can be merged in the deed. The issue in this case involves Sandra Smith's interest, which the trial court found passed under a contract arising from her actions in participating in the negotiation and sale of the property to Stout. There is no deed into which a contract concerning Sandra Smith's interest can merge.

The final point we wish to make concerns oral argument. Often, an argument which is inartfully advanced in a brief will be clarified during oral argument. However, instead of following the usual approach to oral argument, Myers' counsel ignored the arguments alluded to in her brief and merely gave a three-minute dissertation on the doctrine of "departure," quoting extensively from a legal encyclopedia. We note that "departure" was not raised at trial, in Myers' main brief, or



in her reply brief. Especially because her counsel's argument did not address any specific pleadings or facts to which we might apply the doctrine of "departure," we give it no consideration.

We find no merit in any issue properly before this court and affirm the trial court's judgment.



Gregory K. Orme, Judge

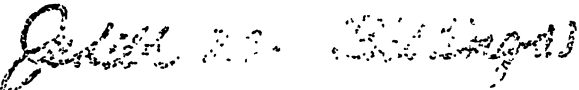
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I CONCUR:



Pamela T. Greenwood, Judge

I CONCUR IN THE RESULT:



Judith M. Billings, Judge

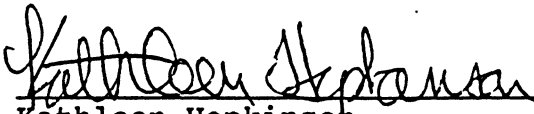
CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION by depositing the same with the United States Mail, postage prepaid to the following:

Royal K. Hunt  
Attorney at Law  
2290 East 4500 South, Suite 170  
Salt Lake City, UT 84117

Carl J. Nemelka  
Attorney at Law  
75 North Center Street  
American Fork, UT 84003

DATED this 9th day of November, 1988.

By   
Kathleen Hopkinson  
Case Management Clerk

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Marcy G. Myers,	)	
	)	ORDER DENYING PETITION
Plaintiff and Appellant,	)	FOR REHEARING
	)	
v.	)	
	)	
Darlene Stout, Et Al,	)	Case No. 860279-CA
	)	
Defendant and Respondent.	)	

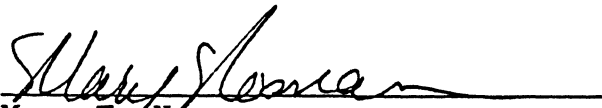
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THIS MATTER having come before the Court upon Appellant's  
Petition for Rehearing in the above captioned matter, and the Court  
having duly considered said petition,

IT IS HEREBY ORDERED that the Appellant's Petition for  
Rehearing is denied

Dated this 21<sup>st</sup> day of December, 1988.

FOR THE COURT:

  
Mary T. Noonan  
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

Royal K. Hunt  
Attorney at Law  
2290 East 4500 South, Suite 170  
Salt Lake City, UT 84117

Carl J. Nemelka  
Attorney at Law  
75 North Center Street  
American Fork, UT 84003

DATED this 22nd day of December, 1988.

By Kathleen Flynn  
Kathleen Flynn  
Case Management Clerk

FILED

Salt Lake City, Utah

MAY 9 1986

CARL J. NEMELKA - Utah Bar No. 2395  
JUNE LUBNIEWSKI WILSON - Utah Bar No. 4367  
Attorneys for Defendant Stout  
610 East South Temple, Suite 202  
Salt Lake City, Utah 84102  
Telephone: (801)521-5552

H. Dixon Hindley, Clerk 3rd Dist. Court  
By R. Golepas  
Deputy Clerk

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooo0ooo---

MARCY G. MYERS,	:	
Plaintiff,	:	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
DARLENE STOUT, et al.,	:	Civil No. C82 5014
Defendants.	:	Judge Fishler

---ooo0ooo---

Trial in the above-entitled matter was heard by the Honorable Philip Fishler on the 26th day of March 1986 and the 25th day of March 1986. The parties were represented by counsel and presented their evidence. Based upon the testimony and evidence received, the court now makes,

FINDINGS OF FACT

1. On or about July 1, 1978 Darlene Stout entered into a Uniform Real Estate Contract for the purchase of the real property in question.
2. Said contract was between Darlene Stout as purchaser and Al Smith dba Al Smith Construction Company as seller.
3. Al Smith Construction Company was not a corporation

at the time of the contract, but "Contemporary Home Builders" was a corporation with Al Smith and Sandra Smith, his wife, as principals.

4. Prior to the purchase by Darlene Stout the Smiths resided in the home in question.

5. During the summer of 1978 Mrs. Stout discussed the sale of the home with Mr. and Mrs. Smith, and both agreed it would be sold to Mrs. Stout.

6. Mrs. Smith acquiesced in the sale and agreed to the sale by showing Mrs. Stout through the home and discussing the purchase price of \$97,500.00.

7. Mrs. Stout made the down payment and the initial monthly payments of \$788.00 to Alvin Smith.

8. Thereafter checks were made payable to Al and Sandra Smith which Sandra Smith endorsed and deposited in a joint bank account.

9. Thereafter Mrs. Stout made payments directly to Tracy Mortgage on the loan for the property. Said loan was in the names of Sandra and Al Smith.

10. Mrs. Smith never indicated to Mrs. Stout she was purchasing one-half of a home, and knew the payments were for the entire property.

11. Upon making the down payment, Mrs. Stout took possession of the home and had recorded a Notice of Interest referring to the contract.

12. Thereafter Mrs. Smith attempted to convey an undivided one-half interest in the property to Capitol Recovery by way of a Warranty Deed dated December 31, 1980.

13. Capitol Recovery paid no consideration for the interest.

14. Capitol Recovery attempted to convey an undivided one-half interest in the property to Jody Larsen, Inc. aka Jody E. Larsen Construction Company, Inc. by Warranty Deed dated January 27, 1981.

15. Jody Larsen, Inc. paid no consideration for the interest.

16. Jody Larsen, Inc. attempted to convey to Larsen and Sons, Inc. its claim to the undivided one-half interest in the property by Quitclaim Deed dated September 15, 1981.

17. Jody Larsen was the president of both Jody Larsen, Inc. and Larsen and Sons, Inc.

18. Larsen & Sons, Inc. had knowledge by and through Jody Larsen that no consideration was paid for the claimed interest.

19. Larsen and Sons, Inc. had knowledge of Mrs. Stout's claims to the entire parcel by means of her possession and her recorded Notice of Interest.

20. Jody Larsen individually had the same knowledge and notice as Jody Larsen, president of Jody Larsen, Inc. and Jody Larsen, president of Larsen and Sons, Inc.

21. No evidence has been presented to show Larsen and Sons, Inc. or Jody Larsen personally gave consideration for the interest.

22. Jody Larsen subsequently filed suit for partition of the property.

23. After Larsen filed suit, Darlene Stout recorded a Notice of Lis Pendens.

24. No evidence was presented to show conveyance by Larsen & Sons, Inc. to Jody Larsen.

Based upon the foregoing Findings of Fact, the Court now makes and enters its,

#### CONCLUSIONS OF LAW

1. Darlene Stout as purchaser and Al Smith dba as Al Smith Construction as seller entered a Uniform Real Estate Contract for the purchase of the subject real property.

2. Sandra Smith orally agreed to the sale and acquiesced in the sale to Stout and knew the sale was for the entire parcel of property.

3. The checks made to Sandra Smith constitute writings referable to her agreement satisfying the Statute of Frauds.

4. Sandra Smith received and accepted benefits from Stout by means of the checks and payments by Stout upon the loan in the names of Al and Sandra Smith, and same constitute part performance.

5. Sandra Smith had no interest in the property when she warranted an undivided one-half interest to Capitol Recovery.

6. Defendant's Notice of Interest in a contract for the purchase of the property and her possession of the property were sufficient to put all subsequent grantees/purchasers on inquiry




notice, and her Lis Pendens put all on actual notice of her claim to the entire parcel of property.

7. Plaintiff has not sustained her burden of establishing that consideration was given by any purchaser/grantee, in her chain of title from Sandra Smith and none are bona fide purchasers for value.

8. Title to the entire parcel of property should be quieted in defendant Darlene Stout.

DATED this 8<sup>th</sup> day of May, 1986.

BY THE COURT:

  
PHILIP FISHLER  
District Court Judge

ATTEST  
H. DIXON HINDLEY  
CLERK

By K. Grotas  
Deputy Clerk

FILED IN CLERK'S OFFICE  
Salt Lake City, Utah

CARL J. NEMELKA - Utah Bar No. 2395  
JUNE LUBNIEWSKI WILSON - Utah Bar No. 4367  
Attorneys for Defendant Stout  
610 East South Temple, Suite 202  
Salt Lake City, Utah 84102  
Telephone: (801)521-5552

JUN 10 1986

H. Dixon Hindley, Clerk 3rd Dist Court  
By R. Gabelas Deputy Clerk

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARCY G. MYERS,

Plaintiff,

vs.

DARLENE STOUT, et al.,

Defendants.

---ooo0ooo---

:

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:

:

:

ORDER AND JUDGMENT

Civil No. C 82-5014

Judge Fishler

---ooo0ooo---

Defendant's Motion to Introduce Exhibit, for Additional Findings of Fact and for Judgment and plaintiff's Motion for Judgment and Motion to Re-open Proceedings to Receive Evidence were heard by the Honorable Philip Fishler on Monday, May 5, 1986. Upon agreement of counsel, and being fully apprised of the matter the court entered its Findings of Fact and Conclusions of Law and the following Order and Judgment,

IT IS HEREBY ORDERED that:

1) A certified copy of a Quitclaim Decree dated May 24, 1982, recorded June 7, 1982 at Page 1046 of Book 5380 in the Salt Lake County Records Office in which Larsen & Sons, Inc. is grantor and Jody Larsen is grantee be, and hereby is admitted into evidence;

2) A certified copy of the corporate documents of

BR 207 NO. 2238  
6-12-86 - 8:10  
aem.

Larsen & Sons, Inc. on file with the State of Utah Division of Corporations be and hereby is, admitted into evidence;

3) The court does hereby take judicial notice of the Pleadings and Discovery on file herein; and

4) Plaintiff's Motion for Judgment be and hereby is denied and that defendant's Motion for Judgment be and hereby is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Darlene Stout Copple is the sole and exclusive owner in fee of the real property more particularly described as:

Lot 23, Glenmoor Country Estates #1, Plat K, according to the official plat thereof on file in the office of the County Recorder of Salt Lake County, Utah.

and title to the above-described real property is hereby quieted in Darlene Stout Copple. The Salt Lake County Recorder's office is ordered that the records therein shall reflect Darlene Stout Copple's title thereto.

DATED this 10<sup>th</sup> day of June, 1986.

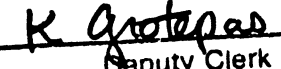
BY THE COURT:

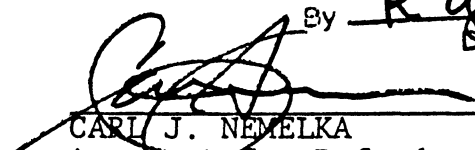
  
PHILIP FISHLER  
District Judge

ATTEST  
H. DIXON HINDLEY  
CLERK

Approved as to Form:

\_\_\_\_\_  
ROYAL K. HUNT  
Attorney for Plaintiff

By   
K. Grotas  
Deputy Clerk

  
CARL J. NEMELKA  
Attorney for Defendant