

1980

John M Alexander And Helen Alexander v. Lee  
Dell Brown, Glen F. Brown, Wayne L. Brown, And  
Warren D. Brown, Partners, dba Blw Company:  
Brief of Appellant

Utah Supreme Court

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#### Recommended Citation

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
JOHN M ALEXANDER and  
HELEN ALEXANDER,

Plaintiffs-Respondents,

vs.

Case No. 17,339

LEE DELL BROWN, GLEN F.  
BROWN, WAYNE L. BROWN, and  
WARREN D. BROWN, Partners,  
d/b/a BLW COMPANY,

Defendants-Appellants.  
-----

BRIEF OF APPELLANT  
-----

APPEAL FROM THE FINAL JUDGMENT OF THE FOURTH  
JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY,  
STATE OF UTAH, HONORABLE ALLEN B. SORESENSEN, DISTRICT JUDGE, PRESIDING  
-----

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FILED

DEC 31 1980

Clark, Supreme Court, Utah

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BRIEF OF APPELLANT  
-----

NATURE OF THE CASE

Plaintiffs brought this action for breach of contract and, in the alternative, fraud. They sought damages for the alleged failure of the defendants to comply with the terms of an Earnest Money Agreement for the sale of real estate. Plaintiffs allege that the defendants failed to improve a side street.

DISPOSITION IN LOWER COURT

This case was tried before the Fourth Judicial District Court in and for Utah County, on June 19, 1980, with the Honorable Allen B. Sorensen, District Judge, presiding.

In his Judgment of September 5, 1980, Judge Sorensen awarded the plaintiffs damages in the amount of \$4,500.00, plus attorney's fees in the amount of \$960.00, and costs in the amount of \$27.50. (For Judge Sorensen's Findings of Fact and Conclusions of Law, and Judgment, see

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the lower court's judgment in favor of the plaintiffs.

Defendants request this court to reverse the ruling holding the Earnest Money Agreement to be unambiguous on its face.

In the event that the defendants are found liable in any way to the plaintiffs, it is requested that the decision of the lower court with regard to the amount of damages be reversed. It is contended that damages should be calculated as of the time when performance was due and the breach occurred, rather than as of some later time.

It is also requested, in the event that the defendants are found liable, that the amount of attorney's fees awarded be reduced so as not to include amounts incurred because of mistakes on the part of plaintiffs' former counsel.

STATEMENT OF THE FACTS

In 1972 and 1973, the defendants were engaged in developing a small subdivision in southwest Provo, Utah, which became known as the Ranchette Lanes subdivision.

Plaintiffs became aware of the lots that were for sale in the subdivision through a newspaper advertisement (r. 126). Plaintiffs contacted Boyd Sorensen, who was the real estate agent representing defendants in the sale of these lots (r.127). Plaintiffs had no dealings with defendants in this matter (r. 127), but had several conversations with Mr. Sorensen concerning the purchase of a lot (r. 169-171).

On or about November 26, 1973, plaintiffs executed an Earnest Money Receipt and Offer to Purchase in which they agreed to buy from defendants

property located in the Ranchette Lanes Subdivision. The lot which plaintiffs agreed to buy was fronted by a street known as 1920 West. Along the side of the lot ran a short dead end street which was designated 460 South (r. 129. See also plaintiff's Exhibit #5).

The Earnest Money Agreement, which was accepted into evidence as plaintiffs' Exhibit No. 2, contained, among other things, a list of possible improvements which could be provided on or appurtenant to the property. This list was found on lines 29, 30 and 31 of the printed agreement. Beside each possible improvement was a small box or square in which marks could be made indicating whether or not the seller was responsible for providing that improvement. An "X" in this box indicated that the seller was responsible for the improvement. An "O" in this box indicated that the seller was not responsible for this improvement. An "X" had been placed in the boxes next to the words "sidewalk", "curb and gutter", and "special street paving", among others.

Paving and curb and gutter were provided by the seller on both sides of the street known as 920 West, which was the main street of the subdivision and the only one which connected with other city streets (r. 129).

However, none of these improvements were provided by the seller on the seller on the dead end side street designated 460 South (r. 129-30. See also plaintiff's Exhibit #5). Neither have the plaintiffs improved their side of this street, although their neighbors across 460 South have improved their side with pavement and curb and gutter by the use of a special improvement district (r. 33. See also plaintiff's Exhibit #5).

No demand was made directly upon the defendants by the plaintiffs for these improvements until a letter was sent by their counsel in July of 1977, approximately four years after the agreement was signed (r. 179-80).

This action was commenced by a Complaint dated September 19, 1977 (r. 2).

This Complaint was subsequently amended because it was the opinion of the plaintiffs' counsel, after reviewing the facts, that the original Complaint did not state a cause of action which could be supported. (r. 3) The Amended Complaint was filed with the District Court on November 20, 1979 (r. 68-71).

At the trial, which was held on June 19, 1980, evidence was heard concerning the amount of damages, which was presumed to be the cost of paving the unpaved portion of the street in question, as of 1973, when the defendants provided improvements (r. 177-78). Evidence was also heard concerning the cost of paving in the fall of 1976 (r. 163), and as of the present time (r. 151).

Evidence was presented to indicate that the cost of providing these improvements has gone up drastically in the time between the purchase of the lot and the present (r. 152, 176-77).

The Judgment of the Court entered on September 5, 1980, awarded an amount of damages corresponding to the evidence concerning the cost of improvements as of 1976 (See: r. 106, 163). The attorney's fees awarded by the court were approximately the full amount requested by the plaintiffs which included amounts charged for the time spent in preparing the defective Complaint (See: r. 164, 196).

Thereafter, defendants properly perfected this appeal.

#### ARGUMENT

##### POINT I

THE CONTRACT, AS TO STREET IMPROVEMENTS, WAS AMBIGUOUS AND IT WAS, THEREFORE, ERROR FOR THE TRIAL COURT TO EXCLUDE COMPETENT EVIDENCE OF

## THE INTENT AND UNDERSTANDING OF THE PARTIES.

It is well established and not contested that a court must look first to the contract itself to determine its meaning. However, it is equally well established that if a contract is vague, ambiguous, or in any way unclear, and when no contemporaneous documents are available to aid in its interpretation, the court may resort to extrinsic evidence to determine what the intent of the parties was. Thus, the Utah Supreme Court in Ewell and Sons, Inc. v. Salt Lake City Corporation, 27 Utah 2d. 188, 493 P.2d 1283 (1972), said:

It is elementary that whenever there is uncertainty or incompleteness with respect to what the rights and duties under a contract are, it is permissible to receive collateral evidence to determine those matters.

Similarly, in Radley v. Smith, 6 Utah 2d 314, 313 P.2d 465 (1957), the court held that:

Whenever uncertainty or ambiguity exists with respect to the terms of an agreement and the intent of the parties) it is proper for the Court to consider all of the facts and circumstances, including the words and actions of the parties forming the background of a transaction.

The Utah Supreme Court in E.A. Strout Western Realty Agency, Inc. v. Broderick, 522 P.2d 144 (1974) listed the more common grounds for introduction of parole evidence to aid in the interpretation of contracts. Said the Court at 145:

"Parole evidence may be received to clarify ambiguous language in a contract, to show what the agreement was relative to filling in blanks, and to supply omitted terms which were agreed upon but inadvertently left out of the written agreement."

(See also: Milford State Bank v. Westfield Canal and Irrigation Company, 108 Utah 528, 162 P.2d 101 (1945); Western Development Company v. Nell, 4 Utah 2d 112, 288 P.2d 452 (1955); Moon Lake Water Users Ass'n v. Hanson, Utah, 535 P.2d 1262 (1975); Oberhansly v. Earle, Utah 572

P.2d 1384 (1977); Wingets v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972)).

A case particularly applicable to the one at bar is Continental Bank and Trust Co. v. Stewart, 4 Utah 2d 228, 291 P.2d 890 (1955). In that case, an agreement for the sale of real property provided that the purchaser was to pay the debts of the vendor. The action was by a third party beneficiary to that agreement against the purchaser to compel payment of some of the debts which the vendor owed the third party. The question presented was whether parole evidence should be admitted to prove which debts of the vendor were intended to be covered by the agreement. The court held that, since the contract did not specify which debts were to be paid by the purchaser, the term was unclear and ambiguous and the intent of the parties with relation thereto could be determined by reference to parole or extrinsic evidence. Said the Court:

"In view of the lack of definiteness in the terms of the contract, it was proper for the court to receive extraneous evidence as to its meaning."

The Supreme Court of Wyoming faced a case similar to the instant one in Kilbourne-Park Corp. v. Buckingham, Wyoming, 404 P.2d 244 (1965). In that case a contract required the plaintiff, for a specified sum, to complete all roadways as platted in a certain subdivision. Plaintiff brought an action seeking recovery of the balance due under the contract claiming that he had fully performed but had not been fully paid. One of the questions presented was whether parole evidence was admissible to supplement and explain the written agreement by helping to determine which roads had been contracted to be built. The Court allowed such evidence holding that:

"It is immediately apparent that parole evidence was required to establish what subdivision plat delineated the roads then being contracted to be built and what was the full understanding of the parties as to which roads were being contracted for."

The disputed term contained in the contract in this case contains nothing but a list of possible improvements for which the seller may be responsible, and a check or "X" by certain of them. This cryptic reference to the seller's responsibility refers to certain improvements just as the contract in Continental Bank referred to certain debts. These references suffer from the same ambiguity. Both are in very general terms. Neither specifies the items, or the type or number of items, referred to. In both cases, therefore, parole evidence is properly admissible to determine the intent of the parties.

The contract in Kilbourne-Park required the improvement of streets which were referred to but not identified. The court properly allowed parole evidence to establish the full understanding of the parties as to which roads were being contracted for. The contract in the case at bar suffers from precisely this same ambiguity.

Logically, this reference to improvements in the contract would seem to refer only to main streets or streets which, in the contemplation of both parties, would be used for traffic and access to and from the houses. It is not reasonable to suppose that this term could be interpreted to require that every alley or sideway be paved and curbed and guttered. At least it must be admitted that the meaning of this term is unclear enough that extrinsic evidence ought to be admitted to determine the intent of the parties with reference to it.

In addition, the only paving required by this term is "special" paving. The word "special" is never defined in the agreement, but it

does not seem logically to refer to any sort of paving on any street  
sideway whatsoever. This term is particularly ambiguous and particularly  
requires parole evidence for interpretation.

As this court said in Wingets Inc. v. Bitters, 28 Utah 2d 231,  
P.2d 1007 (1972):

"If there is a basis in (the language of the contract)  
upon which the parties reasonably could have a misunderstanding  
with respect to its intent, then extraneous evidence can be  
received and considered to ascertain it. Moreover, in making  
that determination, the Court is not bound by any single  
provision of expression, but should look to the whole contract  
and its purpose."

Thus, all facts and circumstances should be considered to aid  
the Court in interpreting a contract term as vague and uncertain in its  
meaning as the present one. This the trial court failed to do, and  
thus the trial court erred.

## POINT II

THE CONTRACT WAS NOT AN INTEGRATION AS TO THE SIDE STREETS BECAUSE  
IT WAS NEVER INTENDED TO REFER TO THE SIDE STREETS. EVIDENCE SHOULD  
HAVE BEEN ADMITTED BOTH TO PROVE THE SUBJECTS INTENDED TO BE COVERED BY  
THE CONTRACT AND TO SHOW THE INTENTION OF THE PARTIES TOWARD THOSE  
SUBJECTS NOT COVERED BY THE CONTRACT.

A contract is an integration designed to be the final word of the  
parties as to the subjects which it covers. Admittedly, parole evidence  
is not admissible as to these subjects if they are covered in a clear  
and unambiguous way. However, this general rule cannot be brought into  
play until those subjects about which the contract was intended to be an  
integration are identified. The parole evidence rule, then, applies  
only to evidence about those subjects. Thus, the Utah Court in Park  
v. Wasatch Chemical Co., 104 Utah 272, 143 P.2d 281 (1943) quotes

section 2430 of Wigmore on Evidence as follows:

"The inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject...Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto...This intent must be sought...in the conduct and language of the parties and the surrounding circumstances...The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered..."

The rule that parole evidence is allowable in an initial inquiry as to the subjects intended to be covered by the contract has been accepted in other jurisdictions as well; (See: Aztec Film Productions v. Tucson Gas & Electric Co., 11 Ariz. App. 241, 463 P.2d 547 (1969); Peter Pan Seafoods, Inc. v. Olympic Foundary Company, 17 Wash. App. 761, 565 P.2d 819 (1977); Hatley v. Stafford, 284 Or. 523, 588 P.2d 603 (1978)).

In this case, it is certainly questionable that the contract was intended to refer to these side streets at all. No evidence was allowed or admitted indicating that it was. Indeed, evidence was proffered which would indicate that it was specifically agreed by both parties that this agreement did not refer to the side streets, and that improvements to the side streets were, therefore, not the responsibility of the defendants. This evidence was excluded by the trial court. It should have been admitted as evidence relevant to the initial inquiry concerning the subjects intended to be covered by the contract. Its exclusion was, therefore, error.

### POINT III

IF A BREACH IS FOUND, THE TIME AS OF WHEN THE DAMAGES SHOULD BE CALCULATED IS THE TIME WHEN PERFORMANCE WAS DUE AND THE BREACH OCCURED

In his treatise on the law of contracts, Professor Corbin says in

Section 1005 that "Compensation for the plaintiff's losses is to be with reference to the conditions existing at the time when performance is due and the contract is broken."

In this case it was determined that the amount of damages would be the amount required to be paid for the improvements which the defendant agreed but failed to provide. It is the defendant's contention, of course, that they provided all the improvements which they agreed to provide in the contract. However, if it is found that they are responsible for other improvements, they should be responsible only for the cost of those improvements as of the time when they agreed and became obligated to provide them.

The evidence indicates that the cost of these improvements has gone up rapidly in the time between contracting and the present. It is neither fair nor just for the defendants to be held responsible for these increases in prices which occurred while the plaintiffs were doing nothing and had failed even to inform the defendants of the alleged breach. The trial court awarded damages as of a date two or three years after the alleged breach. This was error.

#### POINT IV

PLAINTIFFS HAD AN AFFIRMATIVE DUTY TO MITIGATE THEIR LOSSES RATHER THAN SIT IDLY BY WHILE GREATER AND GREATER DAMAGES ACCRUED.

Clearly, the law of contracts contains a rule that damages caused by a breach of contract are to be mitigated if possible. The Restatement of Contracts 2d, Section 336 (1) states: "Damages are not recoverable for harm that plaintiff should have foreseen and could have avoided by reasonable efforts to avoid undue risk, expense, or humiliation." The official comment on this section says under (a): "After the plaintiff has reason to know that

breach has occurred or that a breach is impending under circumstances such that it is not reasonable for him to expect the defendant to prevent harm, he is expected to take such steps to avoid harm as a prudent person would take. He cannot get damages for harm that could thus be avoided."

This section of the Restatement harks back to the famous concurring opinion of Judge Cardozo in McClelland v. Climax Hosiery Mills, New York, 169 N.E. 605 (1930), in which he says that the usual measure of damages in a breach of contract action is only a prima facie measure of damages. The real measure of damages, he says, is to pay whatever damages have actually been suffered by the non-breaching party. These must exclude damages that a party, acting reasonably, would have diminished or avoided.

That case involved an employment contract which was breached. The employee made no attempt to find other employment, and then sought to sue for the total wages that he would have been paid over the period of the contract. Said Judge Cardozo: "The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by this supposed duty is merely this: That if he unreasonably rejects, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequences of the earlier discharge. He has broken the chain of causation, and the loss resulting to him thereafter is suffered through his own act."

The leading case in this area is the New York case of Losei Realty Corporation v. City of New York, 171 N.E. 899 (1930). In that case, the city had agreed to dredge some underwater property belonging to the plaintiff and build up the adjacent shoreline, thus making the property

a suitable place for ships to dock. The city failed to perform properly. The plaintiff sued for, among other things, damages caused by delay in completing the work. He was not allowed these damages because he had stood idly by for nine months and allowed such damages to accumulate while doing nothing to avoid them.

Said the court:

"When...the time arrives when a reasonable man would give up hope of performance, the plaintiff would no longer be justified in leaving the land idle and claiming damages for delay for an indefinite period. If it acted reasonably, it would be entitled to recover the entire loss...The law wisely imposes upon a party subjected to injury from the breach of a contract the active duty to make reasonable efforts to render the injury as light as possible. When the city failed to complete its contract, the plaintiff was bound to use reasonable efforts to mitigate the damages. It has no right, by obstinately persisting in treating the contract as alive, to make the damages larger than they otherwise would have been.

This general rule is restated in the recent Utah case of University Club v. Invesco Holding Corporation, 29 Utah 2d 1, 504 P.2d 29 (1972)

In that case, the Utah Supreme Court said:

"The recognized rule is that where one party definitely indicates that he can not or will not perform a condition of a contract, the other is not bound to uselessly abide time, but may act upon the breached condition. Indeed, in appropriate circumstances he ought to do so to mitigate damages."

In University Club, the corporate landlord failed to maintain proper air conditioning for the tenant business. The court was holding that the tenant was not required to sit idly by for thirty days, as required by the lease, before taking steps to make its damage as light as possible. It could then sue the defendant for costs incurred in doing so.

Almost seven years have passed since this alleged cause of action accrued. The plaintiffs waited about four years before ever bringing

this action. There is evidence that the plaintiffs were, at times, completely unable to use their driveway due to the muddy condition of the road. There is also evidence that some or all of their neighbors have done the paving work on their own through the use of a special improvement district. It would have been possible for the plaintiffs to join in such a district. The evidence is clear that the cost of improvements has skyrocketed in these intervening seven years. It does not seem fair to require the defendants to provide the improvements at their present inflated cost when, if they agreed to anything, they only agreed to provide the improvements at the former cost. It would have been very possible, indeed reasonable and prudent, for the plaintiffs to provide the improvements themselves and then sue the defendants for their costs. The law imposes a duty of mitigation when such circumstances and possibilities exist. As Judge Cardozo said, defendants are not responsible for damages which the plaintiffs could reasonably have prevented but failed to prevent. Thus, defendants are not legally responsible for the increased costs of improvements which resulted from the plaintiffs' sitting on their hands and doing nothing about it.

#### POINT V

IT WAS ERROR TO INCLUDE IN THE AMOUNT OF ATTORNEY'S FEES AWARDED SUMS ATTRIBUTABLE TO MISTAKES MADE BY PLAINTIFFS' FORMER ATTORNEY WHICH WERE IN NO WAY THE FAULT OF THE DEFENDANTS.

As noted in the facts statement, supra, the amount of attorney's fees awarded by the trial court included sums attributable to pleadings prepared by the plaintiffs' former attorney which had to be amended because they could not be supported. Such sums should not be included

in defendants damages, if a breach is found to have occurred, because defendants are not, by any stretch of the imagination, responsible for them.

This court has said in Wallace v. Build Inc., 16 Utah 2d 401, P.2d 699 (1965), that a prevailing plaintiff is entitled to only reasonable attorneys fees. What is "reasonable" is not, according to the court, necessarily controlled by any set formula. Rather, it is to be judged according to a number of relevant factors. It is certainly not reasonable to hold the defendants responsible for the mistakes of others in which they had absolutely no part, no matter how understandable such mistakes may be.

#### CONCLUSION

The trial court held as a matter of law that the Earnest Money Agreement executed between these parties was not ambiguous and was a complete integration intended by the parties to cover the whole of the disputed subjects. Consequently, no evidence was permitted as to the dealings of the parties, negotiations between them, or subsequent statements indicating their understanding of the contract.

The disputed term itself is far from clear and unambiguous. The most cryptic, sketchy reference imaginable to a subject of significant import. Competent evidence of the intent of the parties towards this patently ambiguous term was offered but refused. It should have been accepted.

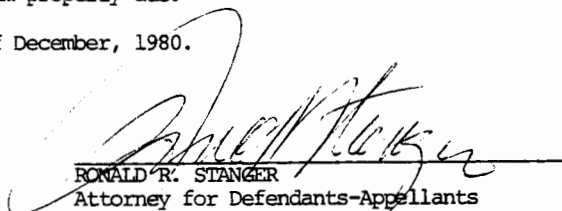
If the contract is to stand alone, it surely should stand alone only as it concerns subjects intended by the parties to be covered by it. Thus, the law allows extrinsic evidence to indicate the subject

about which the agreement was intended to be a final integration. Such evidence was, in this case, offered but refused. It should have been accepted.

Finally, even if it is concluded that a breach occurred, defendants have been required to pay an amount of damages calculated in a manner unjust and contrary to law. Unjust because it includes sums occasioned by the mistakes of others for which defendants' are not responsible, and contrary to law both because it measures damages as of a time long after performance was due and breach occurred and because plaintiffs' duty to mitigate their damages is ignored, causing the defendants to be charged with losses which they cannot reasonably be said to have caused.

Defendants respectfully pray that the decision of the trial court be reversed, or, in the alternative, that the amount of damages be recalculated to reflect the sum properly due.

Submitted this 29 day of December, 1980.

  
RONALD R. STANGER  
Attorney for Defendants-Appellants

MAILED two (2) copies of the foregoing Brief to Mr. Craig M. Snyder, HOWARD, LEWIS & PETERSON, Attorneys at Law, 120 East 300 North Street, P.O. Box 778, Provo, Utah, 84601, on this 30<sup>th</sup> day of December 1980.

Steve Sargent  
SECRETARY