

1981

Lorna M. Alder Soffe, aka Lorna M. Alder v. Donald Blaine Ridd and Nancy M. Ridd, His Wife : Brief of Respondents

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LORNA M. ALDER SOFFE, aka
LORNA M. ALDER,

Plaintiff and Appellant,

vs.

Case No. 17342

DONALD BLAINE RIDD and
NANCY M. RIDD, his wife,

Defendants and Respondents.

BRIEF OF RESPONDENTS

Appeal from a Judgment of the Third District
Court of Salt Lake County
Honorable David B. Dee, Judge Presiding

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- Freedman v. Rector, Wardens & Vestryman of
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- Fullmer v. Blood, 546 P. 2d 606 (Utah 1976).....
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- Perkins v. Spencer, 121 Utah 468, 243 P. 2d
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- 22 Am. Jur 2d, Damages, Sec. 142.....
- 25 C.J. S., Damages, Sec. 84.....
- Osborne, Nelson & Whitman, Real Estate Finance Law,
WestPublishing Co., 1979, Section 3.26, p. 80.....
- Summary of Real Property Law, Vol. I, Brigham Young
University, 1979, p. 305.....

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LORNA M. ALDER SOFFE, aka	:	
LORNA M. ALDER,	:	
	:	
Plaintiff-Appellant	:	
	:	
vs.	:	Case No. 17342
	:	
DONALD BLAINE RIDD and	:	
NANCY M. RIDD, his wife,	:	
	:	
Defendants-Respondents	:	

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an unlawful detainer case brought by plaintiff-appellant to obtain possession of real property sold under a modified Uniform Real Estate Contract, and with a counterclaim seeking to avoid a forfeiture of all monies paid as unconscionable.

DISPOSITION IN LOWER COURT

Defendants-respondents were granted judgment on their counterclaim in the amount of \$15,897.19. Appellant's motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Defendants seek an affirmance of the trial judge's decision.

STATEMENT OF FACTS

Defendants are in disagreement with substantial portions of the Statement of Facts set forth in plaintiff's brief.

On March 10, 1978, plaintiff Soffe and defendants Ritz entered into a modified Uniform Real Estate Contract where plaintiff agreed to sell and defendants agreed to purchase home and lot at 1341 East Creek Road, Sandy, Utah, for the sum of \$57,500.00 (Exh. 1 and Tr. 125). That contract provided for a down payment of \$16,500.00, monthly payments of \$325.00 commencing on April 10, 1978 and continuing thereafter until March 10, 1979, and a balloon payment of no less than \$10,000.00 and no more than \$16,500.00 on March 10, 1979 (Exh. 1). The contract provided for possession to be delivered to defendants on March 10, 1978, and for interest on the unpaid principal balance at the rate of nine and one-half (9½%) percent per annum from and after March 10, 1978 (Exh. 1). The contract was prepared by plaintiff who was represented by counsel (Tr. 177-179). Defendants were not represented by counsel during negotiations on the contract (Tr. 178). The property was not sold and there was no real estate commission (Tr. 197).

Defendants made a down payment to plaintiff pursuant to the contract.

the contract in the amount of \$16,500.00 (Tr. 126 and 179), and thereafter made thirteen consecutive monthly payments to plaintiff in the amount of \$325.00 each (Tr. 128). Monthly payments made by defendants totaled \$4,225.00, and all payments made by defendants on the contract totaled \$20,725.00 (Tr. 126 and 128). Defendants were unable and failed to make that balloon payment of no less than \$10,250.00 due on March 10, 1979 (Tr. 128)

Defendants were in possession of the premises at 1341 East Creek Road, Sandy, Utah, from March 10, 1978 until June 20, 1979 (Tr. 127 and 190). The fair rental value of the premises at 1341 East Creek Road, Sandy, Utah, during the time of possession by defendants was \$325.00 per month for fifteen months and ten days or a total of \$4,983.22 (Tr. 194 and 214).

The fair market value of the premises at 1341 East Creek Road, Sandy, Utah, on March 10, 1978 was \$57,500. (Tr. 165 and R. 30 at Interog. No. 7). On June 20, 1979, the property was in better condition and worth substantially more than \$57,500.00 (Tr. 204 and 225). During occupancy the defendants made modest improvements which included repainting of the kitchen and family room (Tr. 183). After retaking possession of the premises on June 20, 1979, plaintiff paid a sewer fee of \$5.28(Exh. 6), paid the sum of \$100.00 for cleaning (Exh. 5), paid the sum of

\$73.00 for fire insurance (Exh. 3), repaired a fence for (Tr. 168), and together with her husband, spent additional (found by the Court to be 50 man-hours worth \$375.00) in cleaning and making repairs to the premises (Exh. 7). In addition, plaintiff substantially improved and bettered the premises by painting of the interior (Exh. 4) and exterior (Exh. 4) of the home, replacing shrubs (Tr. 160 and Exh. 4), replacing utility room linoleum (Tr. 158 and Exh. 4), installing new carpeting (Tr. 156 and Exh. 4) and draperies (Tr. 156 and Exh. 4), and other miscellaneous work (Exh. 4). These improvements were benefits to the home and premises and resulted in placing the home and premises in better condition than they were in immediately prior to possession by defendants (Tr. 167, 207 and 219). Prior to the purchase and possession of the home by defendants, the landscape shrubbery was overgrown (Tr. 207), the interior of the home needed paint (Tr. 154, 181 and 218), the exterior paint was peeling (Tr. 160, 182 and 222), the linoleum in the utility room was worn (Tr. 158 and 181), the carpets were worn and showing threads (Tr. 132, 153, 181, 206 and 218), and the draperies were dirty and too old to be cleaned (Tr. 133, 206, 209 and 218). After making these improvements and placing the premises for sale, plaintiff quoted an asking

price for the property of between \$90,500.00 and \$91,500.00 (Tr. 167 and 220).

On or about June 12, 1979, plaintiff filed an unlawful detainer action against defendants in the district of the Third Judicial District, Salt Lake County (R. 2). At the commencement of trial plaintiff waived any claim for treble damages (Tr. 127). In its Memorandum Decision the Trial Court held that plaintiff was not entitled to an offset or recoupment for improvements to the home and premises which were a benefit and resulted in placing the home and premises in better condition than they were in immediately prior to possession by defendants (R. 61). In its Memorandum Decision the Court held that the plaintiff was entitled to damages as an offset or recoupment by reason of the failure of defendants to make a balloon payment (R. 61 and 62). Said damages were set forth in the Memorandum Decision as follows:

Title insurance	\$259.00
Sewer Fee	5.28
Cleaning	100.00
Labor of plaintiff and husband	375.00
Fence repairs	100.00
Fire insurance on home	73.00
Fair rental value during defendants' possession	<u>4,983.22</u>
Total Damages	\$5,895.50 (Tr. 61 & 62)

ARGUMENT

POINT I.

THE TRIAL COURT'S DECISION IS SUPPORTED BY THE EVIDENCE AND IS CONSISTENT WITH WELL RECOGNIZED CASE LAW.

A. FORFEITURES AND LIQUIDATED DAMAGES

The parties to this action stipulated that defendants paid \$16,500.00 on a real estate contract with a total price of \$57,500.00 (Exh. 1 and Tr. 126). Defendants had possession of the property from March 10, 1978 to June 20, 1979 (Exh. 1, Tr. 127 and 190). During that time period the defendants made thirteen payments of \$325.00 each or an additional sum of \$4,225.00 (Tr. 128). The total amount paid by defendants to plaintiff totaled \$20,725.00 (Tr. 126 and 128). The balance of payment of no less than \$10,250.00 required to be made on March 10, 1979 was not paid (Tr. 128).

On June 12, 1979, plaintiff filed this unlawful detainer action (R. 2). Defendants counterclaimed for the return of amounts paid to plaintiff in excess of plaintiff's actual damages on the basis of an unconscionable forfeiture (R. 2).

A number of Utah cases have held that a liquidated damages provision will not be enforced unless it bears some reasonable relationship to the actual damages:

" This court is committed to the doctrine, that where the parties to a contract stipulate the amount of liquidated damages that shall be paid in case of breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained...

" On the contrary, where enforcement of the forfeiture provision would allow an unconscionable and exorbitant recovery, bearing no reasonable relationship to the actual damage suffered, we have uniformly held it to be unenforceable."

Perkins v. Spencer, 121 Utah 468, 243 P. 2d 446, 448, 449 (1952)

* * * * *

" It is now established in this state that where a forfeiture provision allows an unconscionable and exorbitant benefit to be retained by the seller which bears no relationship to the damages which have been sustained or reasonably could have been contemplated, it provides for a penalty or punitive damages which courts of equity will not enforce."

Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294, 298 (1954)

* * * * *

"This court has long been committed to the rule that parties to a contract may agree as to the amount of liquidated damages that shall be paid in the case of a breach, that the agreement is enforceable if the amount stipulated to is not disproportionate to the damages actually sustained. The provision in a contract for the sale of real property that all payments which have been made will be forfeited as liquidated damages will not be enforced if the forfeiture would be grossly excessive and disproportionate to any possible loss so as to shock the conscience."

Johnson v. Carman, 572 P. 2d 371, 373 (Utah 1977)

Other cases having declared an unlawful forfeiture are Kay v. Wood, 549 P. 2d 709 (Utah 1976), and Call v. TimberLakes Corporation, 567 P. 2d 1108 (Utah 1977).

A comparison of facts in those cases and in this case reveal that these defendants have been subjected to an unconscionable forfeiture. In Perkins v. Spencer the purchaser paid \$2,500.00 down on a \$10,500.00 contract. The total paid on that contract was \$2,725.00. A forfeiture was declared in that case based on a down payment of 23% and total payment of 25%. The corresponding figures in this case show a down payment of 28% and total payments of 36%. In fact, in none of the heretofore cited cases were the percentages greater than in this case. Furthermore, judgments have withstood appeal where the amount involved was much less than in this case. For example, in Jacobson v. Swan, this Court affirmed judgment in favor of the purchaser in the amount of \$1,823.38. Similarly, in Call v. TimberLakes Corporation, this Court found a forfeiture when the total amount paid over a period of three plus years was \$3,181.07 on a \$10,000.00 contract. In Kay v. Wood the purchaser had made a 4% down payment, had occupancy for one year and was awarded judgment in the amount of \$4,663.00.

Plaintiff cites in her brief the case of Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396(1963), but in so doing seriously misstates the facts of that case. A reading of the entire decision will show that the purchasers expended \$28,762.00. However, the purchasers had occupancy for 33 months and admitted that the motel had a fair rental value of \$450.00 per month or a total of \$14,850.00. The fact which plaintiff conveniently neglected to recite shows that the original purchasers assigned or sold their buyer's equity to a third party, and that they received as consideration a total of \$15,615.00. Adding the fair rental value for 33 months of \$14, 850.00 to the amount received upon resale of \$15,615.00, gives a rental value plus payments received of \$30,462.00. In the words of this Court on page 398, "... the payments credited and the rental value of the motel property amounts to \$30,462.00, which is \$1,699.00 more than they have paid."

In her brief the plaintiff quotes extensively from the dissenting opinion in Johnson v. Carman. In doing so the plaintiff cites two very old California cases. However, plaintiff has failed to look at more recent California cases, and particularly the leading case of Freedman v. Rector, Wardens & Vestryman of

St. Mathias Parish, 230 P.2d 629 (Cal. 1951). In the Fre case, the California Supreme Court expressly rejected the reasoning of Glock v. Howard & Wilson Colony Co., 123 Cal. 55 Pac. 713(1898). It is of significance to note that in v. Rector, Justice Traynor, after discussing the basic pr issues, relied for his primary authority upon the Utah ca Malmberg v. Baugh, 62 Utah 331, 218 Pac. 975 (1923). The Malmberg v. Baugh was the forerunner of Perkins v. Spence was cited with approval in the latter case.

By citing authorities from states other than Utah, plaintiff would appear to be attempting to create the im that Utah follows a minority view or that the trend of ca against recovery. From the authorities we find the oppos be true. In Osborne, Nelson & Whitman, Real Estate Finance West Publishing Co., 1979, Section 3.26 at page 80, we re follows:

" Traditionally, installment land contract forfeiture provisions were routinely enforced in favor of the vendor. While forfeitures are still occasionally traditionally enforced, it nevertheless can be safely stated that in no jurisdiction today will a vendor be able to assume that forfeiture provisions will be automatically enforced as written. This change is the result of both legislative and judicial intervention to ameliorate the harsh impact of automatic forfeiture

Plaintiff criticizes the rule of Perkins v. Spencer, and in so doing compares financing by real estate contract to that of mortgages and trust deeds. In this regard it is important to note that the foreclosure of mortgages and trust deeds are both regulated by statute. In both instances, the vendee is given the opportunity to bid at sale and, in effect, pay the entire outstanding balance. Under a mortgage foreclosure, the mortgagor-vendee even has a right to redeem after six months. However, the forfeiture provision in the subject contract operates as a strict foreclosure provision without any opportunity to bid at a judicial or public sale. It is important to note in this regard that the subject real estate contract had been modified so as to expressly prohibit accelerated payments (Exh. 1). Defendant Donald Blaine Ridd testified that he could not obtain financing for the payment due on March 10, 1979 because he did not hold title to the property, but could have obtained financing for the entire outstanding balance (Tr. 202 and 203). He further testified that plaintiff would not accept the entire unpaid balance (Tr. 203).

B. DAMAGE OR LOSS RECOGNIZED AS AN OFFSET.

In Perkins v. Spencer, this Court stated that, when the

contract provision is unenforceable, the rights of the party should be adjusted by reference to damages ordinarily recoverable. The Court proceeded to set forth the items of damages loss to which vendors are entitled:

- "(1) Loss of any advantageous bargain;
- (2) Any damage to or depreciation of the property;
- (3) Any decline in value due to change in market value of the property not allowed for items Nos. 1 and 2; and
- (4) For the fair rental value of the property during the period of occupancy.

The total of such sums should be deducted from the amount paid in, plus any improvements for which it would be fair to allow recovery, and any remaining difference awarded to the plaintiffs"
243 P. 2d at 451

An analysis of the claims made by plaintiff will show that they are grossly exaggerated and that they do not come within the purview of damages ordinarily recoverable as set forth in Perkins v. Spencer.

C. FAIR RENTAL VALUE IS CHARGED ONLY FOR THE PERIOD OF OCCUPANCY.

The plaintiff has attempted to charge the defendants the fair rental value of the property up to the time of trial. In plaintiff's Brief at page 3 she expressly claims rental

"... for twenty-five months, said time from the date of contract until the time of trial..."

The cases clearly do not permit such a computation. In Perkins v. Spencer, this Court clearly specified that the seller's loss would include "... the fair rental value of the property during the period of occupancy." (emphasis added) In this case the defendants were in occupancy for fifteen months and ten days, from March 10, 1978 to June 20, 1979 (Exh. 1, Tr. 126, 127, and 190). Similarly, in 1 Summary of Real Property Law, Brigham Young University, 1978, at page 305, it is recited that damages are to be ascertained by reference to "... the fair rental value during the period of occupancy."

In the case of Johnson v. Carman, this Court did authorize the computation of interest in lieu of fair rental value. In that case, the interest was computed only during the period of occupancy. That decision states, on page 373, that the" ... buyer quit the premises on May 24, 1976". The decision continues on the same page to approve and affirm an interest computation as follows:

" Interest on \$150,000.00 to May 24, 1976,	
at 8½% per annum.....	\$14,485.00"

In this case the only evidence of fair rental value during the period of occupancy was between \$300.00 and \$325.00 per

month (Tr. 194 and 214). Defendant Donald Blaine Ridd testified that in his opinion the fair rental value was between \$325.00 and \$325.00 (Tr. 194). Mark B. Stephens, an expert appraiser called on behalf of the defendants, testified that the fair rental value of the subject property during the period of occupancy by the defendants was \$325.00 per month (Tr. 214). The plaintiff did testify that the fair rental value of the property at the time of trial was \$400.00 to \$450.00 per month (Tr. 214). The trial court in its Memorandum Decision, expressly found the fair rental value to be \$325.00 per month (R. 61).

D. INTEREST IN LIEU OF FAIR RENTAL VALUE.

As previously indicated, the case of Johnson v. Carman permitted the use of interest in lieu of fair rental value. However, this interest cannot be added to the fair rental value. Furthermore, a careful reading of Johnson v. Carman will show that interest was computed on the unpaid balance of the contract at the rate specified in the contract. The method by which interest was computed and a clear explanation that it was added in lieu of fair rental value is found on page 374:

" Here, though, instead of using what may have been a speculative fair market value, seller was granted interest on the unpaid balance of the contract. The

8½% per annum rate used was one agreed upon by the parties in the contract." (Emphasis added)
572 P. 2d at 374

The use of interest in this case in lieu of fair rental value will not appreciably alter the result. The parties intentionally set the monthly payments of \$325.00 to cover interest accruing on the unpaid balance. Consequently, if interest was computed on the unpaid balance of \$41,000.00 at the rate of 9½% per annum from March 10, 1978 to June 20, 1979, the total would be \$ 4,976.94, as compared to rental of \$4,983.22.

In violation of the principles set forth in Johnson v. Carman, the plaintiff has computed the interest to be \$9,800.00 (Tr. 228). An amount that great can be computed only by charging interest on the full contract price from the possession date to the date of trial, and this is clearly contrary to the law set forth in Johnson v. Carman.

E. DAMAGE TO THE PROPERTY IS LIMITED TO THE
COST OF RESTORING THE PROPERTY TO ITS ORIGINAL
CONDITION.

In this case the plaintiff has submitted considerable cost data in an apparent attempt to show the cost of restoration. However, the cost data submitted by plaintiffs is primarily for

materials and labor in making substantial improvements to subject property. The trial court specifically found in its Memorandum Decision that "... the painting and linoleum and the carpeting which was placed in the home greatly benefited its present value..." and that the defendants were not to be charged with such improvements (R. 61). On appeal the plaintiff continues in an effort to charge the defendants with the full cost of those improvements. At trial the plaintiff made no effort to specify an amount which would restore the property to its original condition, but freely admitted that the property was then (at the time of trial) in better condition than it first occupied by the defendants because of the new carpet, paint, etc.:

"Q. In your opinion is the property at the present time in better condition than it was when the Riddells moved in?

A. Oh, Yes.

Q. Would it be in much better condition?

A. Well, new carpeting, new paint jobs inside and out, in three rooms, that is"

(Tr. 167)

This improvement of the property, as distinguished from a restoration to its original condition, was clearly not contemplated in the authorities. The rule previously set forth from Perkins v. Spencer specifies that the seller can offset "any damage to..." the property. In Johnson v. Carman, this Court affirmed the offset of an amount determined as the "reasonable cost to restore premises". (Emphasis added)

It should not take any further citation of authority to understand that the plaintiff cannot charge the defendants with the expense of placing the property in better condition than it was in originally. Nevertheless, because of plaintiff's testimony, the following citations are given:

"Damages arising from temporary injury to land may be measured by different standards, depending on the varying circumstances of each particular case. Where the injury to real property is merely temporary, or where the property can be restored to its original condition, the measure of damages can be, or should include, the cost of repairs or restoration, as where the injury is susceptible of remedy at a moderate or reasonable expense and the cost of restoration may be shown with reasonable certainty, or where the cost of restoration is less than the diminution in the value of the property. This is particularly true where the adoption of the difference in value as the measure of damages would be difficult and uncertain, or where the injury is not so much to the land itself as to improvements thereon. The recovery is limited to the cost of restoring the premises to their original condition, and does not extend to that of placing them in better condition than there were in originally.

"The cost of restoration, however, cannot be adopted as the measure of damages where the cost of restoring the property would exceed the value thereof in its original condition, or the depreciation in the value thereof, or the actual damage sustained by plaintiff or where restoration is impracticable." (Emphasis added)
25 C.J.S., Damages, Sec. 84.

"One of the two rules of damages used most often in measuring recovery for injury to a building or structure is the cost of restoring that building or structure to its condition immediately prior to the injury." (Emphasis added)
22 Am. Jur. 2d, Damages, Sec. 140.

"One group of cases measures damages by the value of the fixture in its condition at the time of removal or destruction. These cases value the fixtures as a part of the real estate and not at its second hand value. A second group of cases holds that the measure of damages for wrongful injury to or removal of fixtures is the cost of repairs or the cost of restoring the property to its condition immediately prior to the wrongful act." (Emphasis added). 22 Am. Jur. 2d, Damages, Sec. 140.

In this case the plaintiff submitted cost data for materials and labor in making substantial improvements on the subject property. This brief will not discuss each and every item, only those involving the greater expense. It is submitted, however, that most other items (except those approved by the court in its Memorandum Decision) are in this same category of improvements. In considering these items it should be noted

the original portion of the home was built in approximately 1911 (Tr. 152).

The largest item is for the interior and exterior paint. The testimony is undisputed that the exterior of the home was badly in need of paint at the time defendants took possession (Tr. 160, 182 and 222). Mrs. Soffe admitted on cross examination that, at the time defendants took possession, the exterior paint was peeling (Tr. 152 and 160) and that paint was needed in the living room (Tr. 154).

Another major item is the new carpet placed in the living room, dining room and small bedroom. Again, the evidence is undisputed that the existing carpet was worn to the point of showing threads (Tr. 132, 153, 181, 206, and 218). The plaintiff's son, Dr. Alder, testified that he had seen threads in the carpet prior to possession by the defendants (Tr. 132), and the plaintiff herself testified that there could have been threads or jute showing (Tr. 153 and 154). Plaintiff further testified that the new carpeting was better than the carpet existing prior to possession by the defendants (Tr. 156). There was also testimony that the carpet in place at the time defendants took possession was at least 18 years old(Tr. 219).

Another major item is the draperies. There was a dispute

in the testimony as to whether the original draperies were washable, but Dr. Alder conceded that the drapes were not (Tr. 133). Defendants' witnesses, including an experienced dry-cleaner, testified that the draperies were dirty and could not withstand cleaning (Tr. 206, 209, and 218). Further testimony was undisputed that the drapes were stored in the basement and were still available when plaintiff retook possession (Tr. 159 and 187). Plaintiff now seeks to charge the defendants with the cost of new draperies in the living and family rooms (Brief at p. 3 and Exh. 4).

Another item is the new linoleum in the utility room. Plaintiff seeks to charge the defendants with the cost of replacing new linoleum (Brief at p. 3 and Exh. 4). However, on cross examination plaintiff admitted that the linoleum in the utility room was worn before the defendants moved in (Tr. 158). Defendant Donald Blaine Ridd gave a more thorough description of the utility room floor upon taking occupancy:

"The floor in the utility room was spongy because of the leak at some point in time that had continued to leak on that spot causing the floor to rot out and there was no asbestos tile on that part of the floor at all (Tr. 181)

The plaintiff seeks to charge the defendants with the purchase of some 12 to 15 shrubs (Brief at p. 3, Tr. 160 and Exh. 5). Dr. Alder testified on cross examination that the existing shrubs were overgrown at the time defendants took possession (Tr. 134). Defendant Donald Blaine Ridd testified that he pruned one shrub back to the edge of the sidewalk (Tr. 188). Because the shrubs were overgrown through several years of non-pruning, the pruning did expose some dead undergrowth (Tr. 188). Plaintiff admitted on cross examination that the 12 to 15 shrubs replaced was in excess of the number pruned by defendants (Tr. 161).

Another significant item was the charge for trash cleanup. It is clear from the testimony of plaintiff that the trash hauled included the 12 to 15 shrubs which were removed by plaintiff after retaking possession (Tr. 165). Dr. Alder testified on behalf of the plaintiff that there was debris in the yard when he inspected the property on June 19th (Tr. 131). Plaintiff introduced Exhibits 8, 9, 10 and 11 which showed garbage piled in the yard. Plaintiff variously testified that those pictures were taken on June 22nd (Tr. 145 and 146) and on June 19th (Tr. 148). Plaintiff testified that she was responsible for

hauling away the garbage shown in Exhibits 8 through 11 (Tr. 146), but she also admitted that defendants did additional cleaning subsequent to the time the pictures were taken (Tr. 148 and 149) . Defendant Donald Blaine Ridd testified that valuable possessions were removed on June 19th and that all of the garbage depicted in Exhibits 8 through 11 was removed by him on June 20th (Tr. 190). The father of Mr. Ridd also testified that he personally helped haul away the garbage depicted in Exhibits 8 through 11 (Tr. 224).

Three witnesses testified on behalf of the defendants that the premises were in better condition on June 20, 1958 than they were when possession was taken on March 10, 1958 (Tr. 204, 207 and 219). Perhaps the most compelling evidence that the expenditures were primarily for improvements to the property comes from plaintiff herself. Plaintiff testified on cross examination that she had asked \$90,500.00 for the sale of the property after the defendants had vacated and the expenditures had been made (Tr. 167). One of the defendants' witnesses testified that plaintiff had quoted an asking price of \$91,500.00 (Tr. 220).

Plaintiff apparently attempts to duplicate or double

asserted costs of improvements by claiming a diminution in value of the subject property. Plaintiff apparently claims that the premises had a fair market value of \$50,000.00 at the time she retook possession, resulting in a diminution of \$7,500.00 (Brief at p. 5). Such an assertion can find no support in the record. On cross examination defendant Donald Blaine Ridd did testify that the property could be sold for \$50,000.00 in the same sense that it could also be sold for \$20,000.00 (Tr. 199). However, he also testified that upon his departure the property was worth a substantial amount more than \$57,500.00 (Tr. 225). The plaintiff produced no monetary evidence whatsoever of any diminished fair market value. In any event, a diminution in fair market value would represent a duplication of the figures given by plaintiff for the making of improvements. The plaintiff certainly cannot measure damage by diminution in fair market value and then add to that the cost of any supposed restoration or improvement.

The plaintiff erroneously characterizes this claimed diminution as " loss of bargain " (Brief at p. 5). There is absolutely no testimony which would support such a claim for loss of an advantageous bargaining. Loss of an advantageous bargain results in this context when a property is sold for an

amount in excess of its then fair market value. (See Cole
Parker, 5 Utah 2d 263, 300P.2d 623 (1956), where the court
found the loss of an advantageous bargain within the meaning
of Perkins v. Spencer. In that case the buyer agreed to
double the value of the real estate.) In this case the
plaintiff responded on cross examination that the fair
value of the property at the time of sale to the defendant
was \$57,500.00 (Tr. 165). That figure is also the contract
price (Exh. 1). Furthermore, to determine whether the plaintiff
claimed the loss of an advantageous bargain, defendant's
in Interrogatory No. 7 as to the fair market value of the
subject property on the date of contract. The plaintiff's
response was \$57,500.00 (R. 30).

E. ATTORNEY' FEE

Four Utah cases bear on the issue of an attorney's fee.
The case of Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294,
(1954), was an unlawful detainer action where the underlying
Uniform Real Estate Contract provided for an attorney's fee.
In denying the seller an attorney's fee, this Court said:

" Plaintiffs are not entitled to recover attorney's fees. In *Forrester v. Cook* the contract provided the same as here that the purchaser agreed to pay all costs and expenses which may arise from enforcing this agreement, including a reasonable attorney's fee. '

"There we held that an action in unlawful detainer was to enforce the right given by statute and not to enforce the provision of the contract. Under this decision the only part of this judgment in plaintiffs' favor is to award them possession of the property and damages for holding over. This case is governed by that decision"

The case of *Forrester v. Cook*, 77 Utah 137, 292 Pac. 206, 213 (1930), involved a real estate contract with language nearly identical to that of the current Uniform Real Estate Contract. In an unlawful detainer action, this Court held as follows:

"The contract between the parties hereto provides for an attorney's fee in ' enforcing this agreement.' This is not an action to enforce the agreement. Plaintiff has proceeded upon the theory that the agreement fixed the status of the parties after forfeiture and that thereupon defendants became tenants at will. Upon the giving of the notice required by the statute this tenancy ceased, and thereafter defendants held possession of the premises unlawfully. The action is summary and limited and is one for recovery of possession of property and damages because of the unlawful detention. No attempt is made to enforce any of the provisions of the contract. The action is not one on contract. The law and not the contract fixes the measure of damages.

No provision is made in the law for an attorney's fee in this sort of action."

In Johnson v. Carman the Court did affirm a case which included an offset of \$1,165.00 for an attorney's fee. However, it must be recognized that the Johnson v. Carman was not an unlawful detainer action. In that case suit was brought by the contract buyer.

This case was and is an unlawful detainer action brought by the plaintiff with a counterclaim by the defendants. In the case law it is clear that the plaintiff is entitled to an offset for an attorney's fee in prosecuting this unlawful detainer action. In this regard it should be noted that the plaintiff retook possession on June 20, 1979 (Tr. 127) and shortly after the Complaint was filed on June 12, 1979 (Tr. 127). Upon retaking possession, the plaintiff would undoubtedly have been content to dismiss the entire lawsuit. This point was clear at the time of trial when plaintiff's counsel waived the claim to treble damages and any reliance upon notices previously given (Tr. 127). However, the plaintiff was unable to do so in her Complaint because the defendants filed an Answer and Counterclaim on June 15, 1979 (R. 13). It is submitted that plaintiff is entitled to no attorney's fee for defending against defendants' Counterclaim.

In any event, the trial court has discretion in awarding attorney's fees. In Fullmer v. Blood, 546 P.2d 606 (Utah 1976), the plaintiff-vendor brought an action to quiet title and to declare forfeiture under a Uniform Real Estate Contract. In that case the trial court held for the plaintiff but failed to award attorney's fees. The Fullmer case differs from the case at issue because in this case the defendants prevailed on the merits and there is consequently less justification for awarding plaintiff an attorney's fee. In holding that the plaintiff-vendor was not entitled to an attorney's fee this Court used the following language:

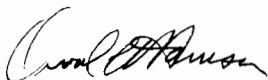
"The final issue to be considered is the plaintiffs' contention by way of cross-appeal, that the trial court erred in refusing to award attorneys' fees pursuant to the terms of the uniform real estate contract. ... A suit of this nature involving invocation of a forfeiture and/or the enforcement of a purchase contract invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court.... In view of these circumstances we are not persuaded that the trial court abused its discretion in refusing to require defendant to pay the plaintiffs' attorney's fees."

546 P. 2d at 610

CONCLUSION

It is respectfully submitted that the trial court's decision is supported by facts in evidence and by the well recognized decisions of this Court.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Orval C. Harrison".

Orval C. Harrison