

2000

# Jeannie Stringam v. Morris Myers, et al. : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

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

C. Val Morley; John Patrick Stovall; Attorney for Appellee.

Terry R. Spencer; Attorney for Appellants.

---

## Recommended Citation

Reply Brief, *Stringam v. Myers*, No. 20000179 (Utah Court of Appeals, 2000).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/2663](https://digitalcommons.law.byu.edu/byu_ca2/2663)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

---

JEANNIE STRINGAM,

Plaintiff/Appellee,

V.

Case No. 20000179-CA

MORRIS MYERS, et al.,

Defendants/Appellant.

---

APPELLANT MORRIS MYERS' REPLY BRIEF

Appeal from the January 31, 2000, FINAL ORDER AND JUDGMENT  
of the Fourth Judicial District Court, Utah County,  
State of Utah, Honorable Guy Burningham, Judge, Presiding

John Patrick Stovall  
1159 East Garfield Ave  
Salt Lake City, Utah 84105  
801 467 5132

Terry R. Spencer  
140 West 9000 South, Suite 8  
Sandy, Utah 84070

C. Val Morley - #6942  
110 South Main Street  
Pleasant Grove, Utah 84062  
801 785 5350

Morris Myers, Defendant/Appellant  
Post Office Box 761  
Midvale, Utah 84047-0761  
Telephone: 801 755 278

**FILED**  
OCT 30 2000  
COURT OF APPEALS

## TABLE OF CONTENTS

	<u>Page</u>
(Introduction: Findings provide basis for review)	1
1. Plaintiff's claim of ambiguity	1
2. Stringam's and Erin Stovall's <u>subjective</u> intent	2
3. Stringam's interpretation	3
4. Stringam's alleged tender	5
5. Four corners rule of interpretation	5
6. Attorney fees	5
7.-(A)(B) Jurisdiction on appeal of February 4, 2000 order and judgment Trial court's failure to find attorney fees unreasonable before reduction	6
8. Appellant Myers "supplemental authority."	7
9. Plaintiff Stringam's motion to dismiss appellant Myers' appeal	7

# AUTHORITIES

	Page
<u>City of Bozeman v. Vaneman</u> , 898 P.2d 1208, 1210-11 (Mont. 1995) -----	1
<u>Crouse v. Crouse</u> , 817 P.2d 836 (UtahApp. 1991) -----	5
<u>Eie v. St. Benedict's Hosp.</u> , 638 P.2d 1190 (Utah 1981)-----	4
<u>Foster-Gardner, Inc. v. Nat. Union Fire Ins.</u> , 959 P.2d 265, 272-73 ((Cal. 1998) -----	2
<u>Frampton v. Wilson</u> , 605 P.2d 771 (Utah 1980) -----	6
<u>Hoffman Construction Company v. Fred S. James Co.</u> , 313 Or. 464, 836 P.2d 703 (1992) -----	2
<u>Kelly v Kosuga</u> , 358 U.S. 516, 520-21, 79 S.Ct. 429, 430-31, 3 L.Ed. 2d 475 (1959) -----	3
<u>Hubbard v. Albuquerque Truck Center, Ltd.</u> , 958 P.2d 111 (N.M. 1998) -----	5
<u>Redel's Inc. v. General Elec. Co.</u> , 498 P.2d 95, 100 and n. 6 (5th Cir. 1974) -----	4
<u>Straley v. Halliday</u> , 2000 UtahApp. 38, 997 P.2d 338 -----	7
<u>Sun Oil Co. (Delaware) v. Madeley</u> , 626 S.W.2d 726, 731, (Tex. 1981) -----	2,4
<u>Taylor v. Estate of Taylor</u> , 770 P.2d 163, 168 n. 6 (UtahApp. 1989) -----	1,6
<u>Wade v. Stangl</u> , 869 P.2d 9, 12 (UtahApp. 1994) -----	5
<u>Walke v. Sandwick</u> , 548 P.2d 1273 (Utah 1976) -----	6
<u>Ward v. Intermountain Farmers Ass'n</u> , 907 P.2d 264 (Utah 1995)	2
<u>Watkins v. Petro-Search, Inc.</u> , 689 F.2d 537, 538 (5th Cir. 1992) -----	2

IN THE UTAH COURT OF APPEALS

---

JEANNIE STRINGAM,

Plaintiff and Appellee,

v.

MORRIS MYERS, ERIN M. STOVALL,  
aka ERIN M. STOVALL, JOHN  
PATRICK STOVALL,

Defendants and Appellant.

---

REPLY BRIEF OF APPELLANT  
MORRIS MYERS

Case No. 20000179-CA

Priority No. 15

An important purpose of findings of fact is to provide a basis for review by the appellate court." Taylor v. Estate of Taylor, 770 P.2d 163, 168 (Utah App. 1989)

[An appellate court will disturb the lower court's decision only if the findings are clearly erroneous. Clearly erroneous is defined by whether the findings are against the clear weight of the evidence, whether the lower court correctly apprehended the evidence, or if the appellate court reaches a definite and firm conviction that a mistake has been made. State ex rel. C.R., 996 P.2d 1059 (Utah App. 2000); City of Bozeman v. Vaneman, 898 P.2d 1208, 1210-11 (Mont. 1995).]

As shown following, as well as in appellant Myers' opening brief, plaintiff Stringam's findings and judgment which rest upon those findings must be set aside because said findings are clearly erroneous in that the record is devoid of facts and inferences to support the findings and the judgment

appealed is unsupported by the findings.

1. The trial court's finding of fact #39 states: "[t]he language in the contract is ambiguous;" finding #12 states: "[t]he agreement was so unclear that it required judicial interpretation as to how to compute the balance due."

Stringam, at page 40 of her brief, contends that "[t]he District Court correctly determined that the agreement is ambiguous and therefore, properly admitted extrinsic evidence to interpret the agreement."

In its findings of fact the trial court fails to identify two plausible interpretations of any operative clause in the agreement [and did not explain how the Agreement was unclear so as to be ambiguous]; this the trial court must do in order to conclude that the agreement is ambiguous. Hoffman Construction Company v. Fred S. James Co., 313 Or. 464, 836 P.2d 703 (1992). The language in the Agreement must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract. Foster-Gardner, Inc. v. Nat. Union Fire Ins., 959 P.2d 265, 272-73 (Cal. 1998); Ward v. Intermountain Farmers Ass'n, 907 P.2d 264 (Utah 1995)

2. Appellee's brief, at pp. 40-41, ". . . Stringam consistently asserted that the Agreement was a lease containing an option to buy. . . and "[b]oth Stringam and Erin Stovall, the only two original parties to the Agreement, testified that the Agreement was a lease/purchase agreement."

"In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls." Watkins v. Petro-Search, Inc., 689 F.2d 537, 538 (5th Cir. 1992); Sun Oil Co.(Delaware) v. Madeley, 626 W.W.2d 726, 731 (Tex. 1981).

Both Stringam's and Erin Stovall's testimony, summarized above, only expresses their subjective intent.

Also, to raise an issue of credibility relative to both women, Stringam's interest is to establish the Agreement as a lease/purchase agreement to facilitate her getting the property for half its value. ["The courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" Kelly v. Kosuga, 358 U.S. 516, 520-21, 79 S.Ct. 429, 430-31, 3 L.Ed.2d 475 (1959)(quoting Continental Wall Paper Company v. Louis Voighy & Sons Company, 212 U.S. 227, 271, 29 S.Ct. 280, 296, 53 L.Ed. 486 (1909) (Holmes, J., dissenting)

Erin Stovall's interest is to establish the Agreement as a sale agreement so that she may participate in the sale proceeds in accordance with the provisions of her divorce decree.

3. Stringam then states in her appellee's brief, pp. 40-41, that the quoted provisions of the agreement, i.e., "this joint venture contemplates the purchase by First Party [Stringam] from Second Party [Erin Stovall] of said property

for \$109,000. . . ." \* \* \* "Second party [Erin Stovall] agrees to sell and First Party [Stringam] agrees to buy said real property." and "\* \* \* [f]inally, on page four, paragraph number 11, the Agreement describes the distribution of the proceeds in excess of \$109,000 if the Home is sold.", compel the interpretation by the trial court that the Agreement is one of lease/purchase.

Out of context, which the above is, Stringam's interpretation cannot be denied. In context, and with the inclusion of the fourth recital ("Whereas, First Party and Second Party intend hereby to state their intentions and agreement as to the entitlement to and distribution of profits in the event of sale of said property which is the ultimate purpose of this joint venture,. . . ."), however, the interpretation urged by Stringam would serve to defeat the intent and ultimate purpose of the Agreement as expressed in the Agreement; and whereby Stringam would be unjustly enriched. [Stringam also fails to explain how Stovall's agreement to pay taxes and insurance while Stringam has all the benefits of ownership of the property supports her theory of sale.] To explain further, if Stringam is permitted to purchase the property for \$109,000 free of the obligations under the joint venture arrangement, in accordance with paragraph 3., then there would be nothing for the joint venture to sell (" . . . in the event of sale of said property which is the ultimate purpose of this joint venture.").



The language of the Agreement by itself establishes the intent of the parties. Redel's Inc. v. General Elec. Co., 498 F.2d 95, 100 and n. 6 (5th Cir. 1974). The applicable rule of construction is that unambiguous language in a contract should be enforced as written. Sun Oil Co. (Delaware) v. Madelay, 626 S.W.2d 726, 731 (Tex.1981); Eie v. St. Benedict's Hosp., 638 P.2d 1190 (Utah 1981). Ordinarily, where the terms of a contract are freely agreed upon by the parties, the court's duty is to enforce the contract. Hubbard v. Albuquerque Truck Center, Ltd., 958 P.2d 111 (N.M. App 1998) Stringam's contention therefore, that the trial court properly denied appellant Myers' post-trial motions (r. 955 et seq.) does not square with the rule as quoted.

4. Relative to Stringam's contention that the trial court properly allowed Stringam to tender the balloon payment to the court during the pendency of the action is no longer a consideration. On December 8, 1997 the trial court at Stringam's request, entered an order providing that "Plaintiff may withdraw her tender of \$109,000 from the Court" which she did on December 16, 1997, by receipting for and receiving the \$109,000 she deposited with the court. (r. 164-166).

Presumably, through simple mathematical calculation, the trial court determined the balloon payment to be \$134,043.24 (r. 1000)

5. In interpreting a contract "we first look to the four corners of the document to determine the intent of the

parties. Wade v. Stangl, 869 P.2d 9, 12 (Utah App. 1994).

6. On the matter of attorney's fees, an award of attorney's fees must be based on evidence of reasonableness of the requested fees. Both the decision to award such fees and the amount of such fees are within the sound discretion of the trial court. Crouse v. Crouse, 817 P.2d 836 (Utah App. 1991). "Attorney fees are awardable only if expressly contracted for, or provided by statute and if there is evidence as to necessity and reasonableness of said fees." Walke v. Sandwich, 548 P.2d 1273 (Utah 1976). Findings are required. Taylor v. Estate of Taylor, 770 P.2d 163, 168 n. 6. (Utah App. 1989) Also, Stringam has provided no evidence of necessity and reasonableness of the requested fees and has failed to claim her costs as the rule requires [rule 54(d)(2), URCiP]; they are therefore waived. Frampton v. Wilson, 605 P.2d 771 (Utah 1980).

7. (A) At page 46 of her appellee's brief, Stringam then states that she is permitted an appeal from the January 31, 2000, and February 4, 2000, orders and judgments, and that appellant Myers cannot now question in his appellant's brief her right to do so.

Myers' raises a jurisdictional issue with respect to the February 4, 2000 order and judgment which can be raised at any time.

(B) Stringam states as one of the issues on appeal that the failure of the trial court to find that Stringam's

attorney fees were unreasonable in face of the trial court's reduction of Stringam's award of attorney's fees, was error. To the knowledge of the undersigned, there is no record of the trial court having considered this issue at trial or by motion for new trial, rule 59(e) motion, or otherwise. And Stringam, at least on this record, did not request finding(s) on the issue. An appellate court should not consider Stringam's argument on this issue therefore, because it is raised for the first time on appeal. Straley v. Halliday, 2000 Ut.App. 38, 997 P.2d 338.

Insofar as paragraph 4. of the trial court's January 31, 2000 order and judgment is concerned, the same did not specify the legal basis for the amount of the award nor how the court arrived at the precise amount of the award.

8. On August 1, 2000, appellant Myers submitted a letter of supplemental authority which may be helpful in the determination of intent regarding a joint venture enterprise. It is not intended to be misleading or to be presented outside the issues of appellant Myers' appeal.

In addition, Stringam did not file a response to appellant Myers' supplemental authority within seven days as the rule requires and therefor has waived any objection she might have. See rule 24(i), URAppP.

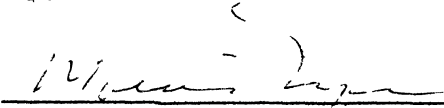
9. At page 33 of her appellee's brief, Stringam urges the appellate court to dismiss appellant Myers' appeal "for lack of jurisdiction because Myers' service of his notice on

Stringam was faulty."

Stringam attacks Myers appeal on purported jurisdictional grounds, viz., ". . .Myers waited a few days [after filing his notice of appeal] to mail the Notice to Stringam. . .and Myers did not include a certificate of service with his notice of appeal." (appellee's brief, at p. 33-34) Stringam does not explain how she was prejudiced by the omissions she describes.

Rule 3(a), Utah Rules of Appellate Procedure, provides "\* \* \*. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, \* \* \*" The grounds asserted by Stringam as jurisdictional for dismissal of appellant's appeal do not, therefore, appear to be jurisdictional.

DATED October 28, 2000.

  
\_\_\_\_\_  
MORRIS MYERS, Appellant  
Post Office Box 761  
Midvale, Utah 84047-0761  
Telephone 801 755 2780

On October 28, 2000, two true copies of the foregoing  
mailed as follows:

Terry R. Spencer  
140 West 9000 South, Suite 8  
Sandy, Utah 84070

C Val Morley  
110 South Main  
Pleasant Grove,  
Utah 84062

John Patrick Stovall  
1159 East Garfield Avenue  
Salt Lake City, Utah 84105

  
\_\_\_\_\_  
MORRIS MYERS