

1982

Nick Faulkner and Karyl Faulkner v. F. Carl Farnsworth et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert P. Orton; T. Richard Davis; Marsden, Orton & Liljenquist; Attorneys for Appellants;
John H. McDonald; Bennet, McDonald & Belnap; Attorneys for Respondents;

Recommended Citation

Brief of Appellant, *Faulkner v. Farnsworth*, No. 18142 (Utah Supreme Court, 1982).
https://digitalcommons.law.byu.edu/uofu_sc2/2785

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

NICK FAULKNER and KARYL
FAULKNER, his wife,

Respondents,

CASE NO. 18142

Appellants.

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT
OF GARFIELD COUNTY, STATE OF UTAH
THE HONORABLE DON V. TIBBS, PRESIDING

Robert F. Orton
T. Richard Davis
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800
Attorneys for Appellants

John H. McDonald
BENNETT, McDONALD & BELNAP
370 East 500 South, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 532-7846
Attorneys for Respondents

FILED

APR 27 1982

IN THE SUPREME COURT
OF THE STATE OF UTAH

NICK FAULKNER and KARYL	:	
FAULKNER, his wife,	:	
	:	
Respondents,	:	
	:	CASE NO. 18142
vs.	:	
	:	
F. CARL FARNSWORTH and	:	
ANN H. FARNSWORTH, his wife;	:	
and JON LEE TORGERSON and	:	
MAVIS TORGERSON, his wife,	:	
	:	
Appellants.	:	

BRIEF OF APPELLANTS

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT
OF GARFIELD COUNTY, STATE OF UTAH
THE HONORABLE DON V. TIBBS, PRESIDING

Robert F. Orton
T. Richard Davis
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800
Attorneys for Appellants

John H. McDonald
BENNETT, McDONALD & BELNAP
370 East 500 South, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 532-7846
Attorneys for Respondents

TABLE OF CONTENTS

	<u>Page</u>
I. NATURE OF THE CASE	1
II. DISPOSITION IN THE LOWER COURT	1
III. NATURE OF RELIEF SOUGHT ON APPEAL	2
IV. STATEMENT OF FACTS	2
V. ARGUMENT	5
A. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT NOTWITHSTANDING THE EXISTENCE OF UNRESOLVED MATERIAL ISSUES OF FACT CREATED BY AMBIGUOUS CONTRACT PROVISIONS	5
B. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT	10
C. THE DISTRICT COURT PROPERLY REFUSED TO AWARD COSTS AND ATTORNEY'S FEES TO RESPONDENTS, AND NONE SHOULD BE GRANTED IN THIS APPEAL	12
VI CONCLUSION	14

AUTHORITIES CITED

Cases

<u>Bank of Ephraim v. Davis</u> , 559 P.2d 538 (Utah 1977) . .	8
<u>Big Butte Ranch, Inc. v. Holm</u> , 570 P.2d 690 (Utah 1977)	7
<u>Bullough v. Sims</u> , 16 Utah 2d 304, 400 P.2d 20 (Utah 1965)	9
<u>Continental Bank & Trust Company v. Stewart</u> , 4 Utah 2d 228, 291 P.2d 890 (1955)	7

TABLE OF CONTENTS - Continued

	<u>Page</u>
<u>Fox Film Corporation v. Ogden Theatre Company,</u> 82 Utah 279, 17 P.2d 294 (1932)	9
<u>Hull v. Goodman,</u> 4 Utah 2d 163, 290 P.2d 245 (1955) .	12
<u>Jensen v. Mountain States Telephone and Telegraph</u> <u>Company,</u> 611 P.2d 363 (Utah 1980)	6
<u>Jones v. Hinkle,</u> 611 P.2d 733 (Utah 1980)	10
<u>Reed v. Alvey,</u> 610 P.2d 1374 (Utah 1980)	7
<u>Seal v. Tayco, Inc.,</u> 16 Utah 2d 323, 400 P.2d 503 (1965)	12
<u>Swain v. Salt Lake Real Estate & Investment</u> <u>Company,</u> 3 Utah 2d 121, 279 P.2d 709 (1955) . . .	13
<u>Utah Farm Production Credit Association v. Cox,</u> 627 P.2d 62 (Utah 1981)	13
<u>Wells Fargo Bank v. Midwest Realty & Finance, Inc.,</u> 544 P.2d 822 (Utah 1975)	12
<u>Youngren v. John W. Lloyd Construction Company,</u> 22 Utah 2d 207, 450 P.2d 985 (1969)	7

Statutes

Rule 54 (d)(1), Utah Rules of Civil Procedure	12
Rule 56 (c), Utah Rules of Civil Procedure	5

NICK FAULKNER and KARYL
FAULKNER, his wife,

Respondents,

VS.

F. CARL FARNSWORTH and
ANN H. FARNSWORTH, his wife;
and JON LEE TORGERSON and
MAVIS TORGERSON, his wife,

Appellants.

二
 三
 四
 五
 六
 七
 八
 九
 十
 十一
 十二
 十三
 十四
 十五
 十六
 十七
 十八
 十九
 二十
 二十一
 二十二
 二十三
 二十四
 二十五
 二十六
 二十七
 二十八
 二十九
 三十
 三十一
 三十二
 三十三
 三十四
 三十五
 三十六
 三十七
 三十八
 三十九
 四十
 四十一
 四十二
 四十三
 四十四
 四十五
 四十六
 四十七
 四十八
 四十九
 五十
 五十一
 五十二
 五十三
 五十四
 五十五
 五十六
 五十七
 五十八
 五十九
 六十
 六十一
 六十二
 六十三
 六十四
 六十五
 六十六
 六十七
 六十八
 六十九
 七十
 七十一
 七十二
 七十三
 七十四
 七十五
 七十六
 七十七
 七十八
 七十九
 八十
 八十一
 八十二
 八十三
 八十四
 八十五
 八十六
 八十七
 八十八
 八十九
 九十
 九十一
 九十二
 九十三
 九十四
 九十五
 九十六
 九十七
 九十八
 九十九
 一百

BRIEF OF APPELLANTS

Case No. 18142

I. NATURE OF THE CASE

This is an equitable action brought by Respondents for specific enforcement of a Uniform Real Estate Contract entered into by and between the parties.

II. DISPOSITION IN THE LOWER COURT

The Sixth Judicial District Court granted Respondents' Motion for Summary Judgment requiring Appellants to transfer title to certain real property to Respondents upon payment by Respondents to Appellants of certain sums, each party to bear its own costs and attorney's fees.

III. NATURE OF RELIEF SOUGHT ON APPEAL

Appellants ask this Court to reverse the judgment of the district court in toto, remanding the matter for trial. Respondents, by way of cross-appeal, also seek the reversal of the judgment of the district court insofar as said court refused to grant an award of costs and attorney's fees in favor of Respondents. Further, Respondents ask this Court to award costs and attorney's fees in favor of Respondents on this appeal.

IV. STATEMENT OF FACTS

On or about the 20th day of December, 1975, Appellants, as buyers, entered into a written Agreement with H. Vance and Emily B. Pope, as sellers, for the purchase and sale of certain real and personal properties situated in Panguitch, Garfield County, State of Utah (Record 110, 121). Said "Pope" Agreement (R. 7-26) concerned the transfer of a motel, cafe, trailer park, and several residential dwellings for the price of \$270,000.00 (R. 110). Warranty Deeds to said real property were required, by paragraph 19 of said Agreement to be placed in escrow with First State Bank, Panguitch Branch, to be released only upon fulfillment of all of the terms and requirements of the escrow agreement. Additionally, Appellants were required by paragraph 16 of said Agreement to execute and deliver to the Popes real

estate mortgages on additional real properties owned by Appellants including their personal residences and a piece of property located near Panguitch Lake (Transcript 10). Said mortgages constituted second liens against the residences as further security for all real and personal properties purchased on the "Pope" Agreement.

On or about the 10th day of April, 1978, Appellants, as sellers, entered into a Uniform Real Estate Contract (R. 4-5) with Tom C. Thorpe, a strawman for Respondents. All negotiations relating to said Uniform Real Estate Contract were in fact between Appellants and Respondents (T. 11-12). Said "Thorpe" Contract concerned the purchase and sale of only a portion of the real property purchased under the "Pope" Agreement for a sum of \$300,000.00 (R. 122; T. 2, 12).

Using a standard printed form supplied and prepared by Respondent, Nick Faulkner, a real estate broker (T. 22), the parties acknowledged, in paragraph 6, the underlying obligation against the property pursuant to the "Pope" Agreement. However, the parties supplemented the printed form with the typewritten clause "which shall be the Sellers obligation to pay and discharge," referring to the "Pope" obligation. At the time of contracting and upon payment by Respondents to Appellants of a \$35,000.00 down payment required in the "Thorpe" Contract, the outstanding obligation on said Contract was in fact smaller than

than the unpaid balance on the "Pope" Agreement (T. 12-13).

The subject "Thorpe" Contract also contains the following provision, the effect of which is the basis for this dispute between the parties:

8. The Seller is given the option to secure, execute, and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed EIGHT percent (8%) per annum and payable in regular monthly installments provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above-described property subject to said loans and mortgages.

On or about the 18th day of September and again on or about the 18th day of November, 1980, Respondents, through their counsel, made written demand upon Appellants for conveyance of the property sold under the "Thorpe" Contract pursuant to paragraph 8 therein (R. 111). Appellants provided Respondents with a written refusal to each demand, together with an explanation as to the inapplicability of paragraph 8 of the Contract to the "Pope" obligation (R. 122).

On or about the 4th day of December, 1980, Respondents commenced this action against Appellants seeking the remedy of specific performance to require Appellants to convey title to

the property to Respondents under the "Thorpe" Contract (R. 1-28). Respondents thereafter filed a Motion for Summary Judgment alleging that "no material issue of fact exists in the case and that [Respondents] are entitled to judgment as a matter of law" (R. 108-109). Said Motion was heard by the Sixth Judicial District Court, Honorable Don V. Tibbs, on the 16th day of October, 1981, at which time each of the facts set forth herein was agreed upon and stipulated to by Respondents (R. 22, 34). The court, however, refused Appellants' request to allow the production of evidence clarifying the intent of the parties concerning the disputed provision, granted Respondents' Motion, and entered a final order requiring that upon Respondents' reduction of the "Thorpe" Contract balance to an amount less than the unpaid balance on the "Pope" Agreement, Appellants must convey the property to Respondent, each party to bear its own costs and attorney's fees in the matter (R. 135-136). Appellants respectfully appeal from said final order.

V. ARGUMENT

A. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT NOTWITHSTANDING THE EXISTENCE OF UNRESOLVED MATERIAL ISSUES OF FACT CREATED BY AMBIGUOUS CONTRACT PROVISIONS.

Rule 56(c) of the Utah Rules of Civil Procedure provides that, upon motion, a summary judgment "shall be rendered forthwith

if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Conversely, if the pleadings, affidavits, and answers to discovery on file, when viewed in the light most favorable to the opposing party, show that there is any genuine issue as to any material fact, a motion for summary judgment must be denied. Jensen v. Mountain States Telephone and Telegraph Company, 611 P.2d 363, 365 (Utah 1980).

In their Answer to Respondents' Complaint, answers to discovery, and affidavits on file herein, together with the copies of documents attached thereto, Appellants specifically raise issues of material fact as to whether the "Pope" obligation was intended by the parties to be affected by paragraph 8 of the "Thorpe" Contract. The court, however, refused to allow evidence to be taken concerning the intent of the contracting parties, basing its decision on the parol evidence rule.

The parol evidence rule has been the subject of voluminous decisions by this Court. Generally, when parties have negotiated on a subject and thereafter reduce the agreement to a written contract, it is assumed that all prior negotiations are fused into the contract so that it represents the full agreement of the parties. Extraneous evidence is, therefore, not ordinarily

permitted to add to, subtract from, or contradict the written document. Youngren v. John W. Lloyd Construction Company, 22 Utah 2d 207, 450 P.2d 985 (1969). When the subject of a dispute is the meaning of the contract, the court "should first examine the language of the instruments and accord to it the weight and effect which it may show was intended," but if the meaning is ambiguous or uncertain, the court should then properly "consider parol evidence of the parties' intentions." Big Butte Ranch, Inc. v. Holm, 570 P.2d 690, 691 (Utah 1977). Courts are thus provided a means by which they can look beyond the terms found in the written contract to delineate the intent of the contracting parties. Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980). Facts concerning the respective situations of the parties, circumstances surrounding the making of the contract, and the purpose of its execution become admissible to ascertain the actual intent of the ambiguous provisions. Continental Bank & Trust Company v. Stewart, 4 Utah 2d 228, 291 P.2d 890, 892 (1955).

The ambiguity in the subject "Thorpe" contract involves the apparent incongruity between paragraphs 6 and 8. To the standard form recital acknowledging the existence of the underlying "Pope" obligation, the parties typed at the end of paragraph 6 the clause, "which shall be the Sellers obligation to pay and discharge." Paragraph 8 is a standard form provision giving Seller the option to secure, execute, and maintain loans

secured by the subject property in any amount less than the outstanding contract balance. Buyer thereby agrees to take title to the subject property subject to said loans when the principal balance of the subject contract is reduced to the amount of seller's encumbering loans and mortgages.

The "Pope" obligation does not readily fit into the anticipated "loan" or "mortgage" classification. The fact that the parties had a clause typed into the contract unequivocally stating that the "Pope" obligation would remain the Seller's obligation casts considerable doubt on the validity of Respondents' assertion that it could be assumed under paragraph 8. The typewritten clause carries weight over otherwise conflicting printed form provisions in a written contract. Bank of Ephraim v. Davis, 559 P.2d 538 (Utah 1977). The parties apparently expressed their intent to exclude the "Pope" obligation from the applicability to paragraph 8 by the typed clause of paragraph 6.

This ambiguity becomes more obvious when the contract is viewed in connection with the comparative balances of the "Pope" Agreement and "Thorpe" Contract. At the moment of contract execution and transfer of the down payment recited therein, the balance on the "Thorpe" Contract was reduced below that on the "Pope" Agreement. If the parties had intended paragraph 8 of the "Thorpe" Contract to apply to the "Pope" obligation, Appellants should have at that time conveyed the property, and

Respondents should have accepted title to the same subject only to the "Pope" obligation. Instead, the parties commenced a regular course of payments keeping both agreements separate; Respondents paid Appellants on the "Thorpe" Contract, and Appellants paid the Popes pursuant to the "Pope" Agreement. Not until after two and one-half years of consistently servicing the respective obligations separately, and at a time when in fact the principal balance of the "Pope" obligation had again been reduced below the balance on the "Thorpe" Contract, did Respondents attempt to invoke the provisions of paragraph 8.

By refusing to receive any evidence concerning the surrounding circumstances, which would have properly enabled it to "look upon the transaction through the eyes of the parties" and "know that they understood or intended the ambiguous . . . provisions to mean," the Court prematurely granted judgment on the merits of the "Thorpe" Contract alone. Fox Film Corporation v. Ogden Theatre Company, 82 Utah 279, 17 P.2d 294, 296 (1932). When the respective parties to a contract place their own construction on the writing and so perform, the Court should receive such evidence since it may be considered as persuasive as to what their true intention was. Bullough v. Sims, 16 Utah 2d 304, 400 P.2d 20, 22 (1965). Failing to consider any such evidence, the District Court erred by granting summary judgment.

B. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

In the lower court, Respondents relied heavily on the recent case of Jones v. Hinkle, 611 P.2d 733 (Utah 1980). There, this Court reversed a lower court judgment and ordered specific performance pursuant to the same provision as paragraph 8 of the "Thorpe" Contract. However, there are significant differences of fact in the present case which preclude heavy reliance on Hinkle. There, the issues were simple. The same piece of proeprty was the sole subject of two consecutive sales. The Uniform Real Estate Contract form was not supplemented by the parties' desire for one party to be solely responsible for the underlying obligation. Neither was there a variance of security offered under the respective contracts. In that case, the contract was found to be unambiguous; the underlying obligation could be assumed, forcing transfer of title.

The contract in this case is not so free from ambiguity. As modified by the clause specifically obligating Appellants for the "Pope" Agreement, paragraph 6 conflicts with paragraph 8. Looking behind the contract to other relevant documents and extraneous evidence, the conflicting provisions of modified paragraph 6 and paragraph 8 may reasonably be reconciled only by excluding the underlying "Pope" obligation from applicability to paragraph 8. The clear intent of the contracting parties was to

apply paragraph 8 only to subsequent loans or mortgages secured by the property.

One of the major reasons for this exclusion of the "Pope" obligation from paragraph 8 was the fact that the two contracts covered the sales of different properties. The "Pope" Agreement included property on which a motel, restaurant, and three houses are located. The "Thorpe" Contract covered only the land on which the motel and restaurant stand. In other words, Appellants sold a smaller portion of land to Respondents than they had purchased from Pope. It would be impractical to attempt to divide title to the property while the entire title rests with Pope pending complete satisfaction of the original obligation. Furthermore, it would be unfair to subject Appellants to a potential default by Respondents on the entire obligation by conveying any rights to part of the property which carries the obligation for the total property. That was clearly not the intent of the parties. Another fact unique to the circumstances of this case further demonstrates the inapplicability of Respondents' paragraph 8 assertions. The "Pope" obligation was secured not only by the property sold to Respondents, but by the other property purchased by Appellants together with their personal residences and property located near Panguitch Lake. Finally, because of the balloon payments required of Respondents under the "Thorpe" Contract which were bargained for by Appellants to enable

prepayment and early satisfaction of the "Pope" Agreement, conveyance and assumption by Respondents of the "Pope" obligation will prolong that obligation by 12 years, unfairly tying up Appellants' property not the subject of the "Thorpe" Contract (T. 18-19).

The facts here are much more complex than in Hinkle. The "Thorpe" Contract, drafted by Respondent, Nick Faulkner, a real estate broker, must be construed strictly against Respondents in case of uncertainty. Seal v. Tayco, Inc., 16 Utah 2d 323, 400 P.2d 503, 505 (1965). This rule of construction is especially applicable when the drafting party seeks to invoke the ambiguous provision against the other contracting party. Wells Fargo Bank v. Midwest Realty & Finance, Inc., 544 P.2d 882, 885 (Utah 1975).

C. THE DISTRICT COURT PROPERLY REFUSED TO AWARD COSTS AND ATTORNEY'S FEES TO RESPONDENTS, AND NONE SHOULD BE GRANTED IN THIS APPEAL.

Rule 54(d)(1) of the Utah Rules of Civil Procedure provides: "Except when express provision therefor is made either in a statute of this state or in these Rules, costs shall be allowed as a course to the prevailing party unless the court otherwise directs" This Court has interpreted Rule 54(d) as leaving the question of awarding costs in the discretion of the courts. Hull v. Goodman, 4 Utah 2d 163, 290 P.2d 245, 247 (1955). The sound discretion of the lower court on this should not be disturbed.

Paragraph 21 of the "Thorpe" Contract provides:

The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

However, no authority is given in the contract, nor by statute, for an award of attorney's fees in absence of a "default" in the covenants or agreements set forth in the contract. In the final Order from which this appeal is made, the court did not declare a default or a breach of contract by Appellants as plead by Respondents in their Complaint. Rather, the court ordered Respondents to make certain principal payments to Appellants and, thereafter, Appellants to convey property to Respondents. Without a showing of Appellants' liability, therefore, either by contract or by statute, the court correctly required each party to pay its own attorney's fees. Utah Farm Production Credit Association v. Cox, 627 P.2d 62 (Utah 1981).

Attorney's fees on appeal are discretionary with the Supreme Court. Swain v. Salt Lake Real Estate & Investment Company, 3 Utah 2d 121, 279 P.2d 709 (1955). Based on similar reasoning to that of the lower court in requiring each party to

bear its own costs and attorney's fees, this Court ought to require each party to continue to so be responsible throughout this appeal, regardless of the outcome.

VI. CONCLUSION

The action of the lower court in granting Respondents' Motion for Summary Judgment should be reversed. Based on the foregoing analysis, this Court should remand the matter to the District Court for a trial on the issues concerning the parties' intentions concerning the paragraphs 6 and 8 of the "Thorpe" Contract and their respective application to the "Pope" obligation.

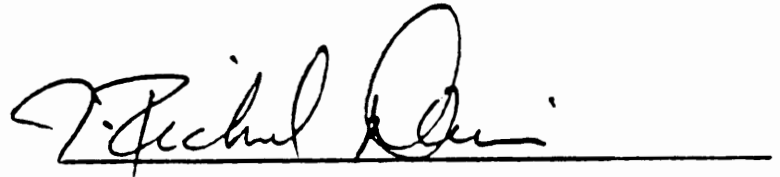
RESPECTFULLY SUBMITTED this 27 day of April, 1982.



Robert F. Orton
T. Richard Davis
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800
Attorneys for Respondents

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing BRIEF
OF APPELLANTS to John H. McDonald, BENNETT, McDONALD & BELNAP,
370 East 500 South, Suite 100, Salt Lake City, Utah 84111,
this 27 day of April, 1982.

A handwritten signature in cursive script, appearing to read "T. Richard Quinn", is written over a horizontal line.