

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

NICK FAULKNER and KARYL  
FAULKNER, his wife,

Plaintiffs-Respondents,

vs.

Case No. 18142

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

Defendants-Appellants.

- - - - -

BRIEF OF RESPONDENTS

- - - - -

Appeal from the Judgment of the  
Sixth Judicial District Court, Garfield County  
Honorable Don V. Tibbs

- - - - -

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BRIEF OF RESPONDENTS

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NATURE OF THE CASE

This is an action commenced by Plaintiffs-Respondents for enforcement of a provision in a Uniform Real Estate Contract relating to assumptions of encumbrances and for reasonable attorneys' fees and costs incurred as a result of Defendants' breach of contract.

DISPOSITION IN THE LOWER COURT

The lower court denied Defendants' Motion to Dismiss and Motion for Summary Judgment and granted Plaintiffs' Motion for Summary Judgment ordering immediate transfer of title to certain real property from Defendants to Plaintiffs and further ordering both parties to bear their own costs and attorneys' fees.

## RELIEF SOUGHT ON APPEAL

Plaintiffs-Respondents seek affirmance of the lower court judgment requiring Appellants-Defendants to convey their rights, title, and interest as to the property involved in this litigation but seek a reversal of the lower court's order denying Plaintiffs-Respondents' attorneys' fees and costs at the trial level. In addition, Respondents seek attorneys' fees and costs for defense of this appeal.

## STATEMENT OF FACTS

Respondents do not seriously disagree with the Statement of Facts proffered by the Appellants. However, Respondents believe that some of the "facts" are irrelevant for purposes of review of this Summary Judgment proceeding and further that arguments of counsel (cited by Defendants) do not constitute evidence sufficient to establish facts which Appellants now argue. For these reasons, therefore, Respondents shall state the facts which they believe are both relevant and supported by competent evidence.

On December 20, 1975 Appellants purchased property located in Panguitch, Utah from Vance Pope and Emily Pope. The contract consisted of a separately typed agreement since no standard real estate printed forms were utilized. (R. 7-19). The agreement called for purchase of the "Bryceway Motel and Restaurant" at a purchase price of \$270,000 at a rate of 7%

interest. The contract contained a schedule of payments to be made in January and July of each year until the balance had been paid.

Paragraph 5 of this Agreement recognized the existence of prior obligations on the property and stated that the sellers (Popes) agreed to assume and pay the obligations and to hold the buyers harmless. Paragraph 6 of that agreement forbid the sellers (Popes) from obtaining additional loans on the property other than the two previously described obligations without the consent of the buyers.

As additional security for the transaction the buyers (defendants herein) also pledged property located near Panquitch Lake and their personal residence. The agreement provided that when the balance of the contract was reduced to \$200,000 that these properties would then be released. (R.1

The Pope-Farnsworth agreement (hereinafter "Pope Contract" encompassed a motel, cafe, trailer park, all of the personal property and water rights needed to operate these enterprises, and in addition three residential dwellings which generated rental income.

In April of 1978 a sale of the motel, cafe, and trailer park was negotiated between Defendants and plaintiffs Nick Faulkner and his wife Karyl. In order to effectuate a tax-free exchange the motel property was purchased in the name of



Tom C. Thorpe. (R. 4-5). The contract was immediately assigned by Thorpe to plaintiffs Faulkner. (R. 6). The purchase from the defendants encompassed all of the property previously sold to them by Popes with the exception of the three residential rental properties.

The Farnsworth-Thorpe contract (hereinafter "Thorpe Contract") provided for a purchase price of \$300,000, a down payment of \$35,000, and required a monthly payment together with specified balloon payment. An 8% interest rate was imposed.

The Thorpe Contract was contained on a printed Uniform Real Estate Contract form which had been filled out by respondent Nick Faulkner who was a real estate agent and broker.

Paragraph 6 of the Thorpe Uniform Real Estate Contract stated the following: "It is understood that there presently exists an obligation against said property in favor of George H. Talbot and H. Vance Pope with an unpaid balance of \$ \_\_\_\_\_ as of \_\_\_\_\_ which shall be the sellers obligation to pay and discharge." (Emphasis added as to typed portion of paragraph).

Paragraph 8 of the agreement provided the following:

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 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.

In September and November of 1980 Respondents through their attorney made written demand upon Appellants for conveyance of the property subject to the Pope Contract. Appellants refused to make such conveyance and insisted that the terms of the Thorpe Contract be enforced.

This action was commenced by plaintiffs Nick Faulkner and his wife seeking a declaration that the defendants had breached the terms of paragraph 8 by their failure to convey title to the plaintiffs, seeking an order of the court requiring such conveyance be made, and requesting costs and reasonable attorneys' fees. (R. 1-3).

On March 5, 1981 Defendants moved to dismiss on the basis that Plaintiffs failed to state a claim against Defendants and had failed to join an indispensable party. (R. 43-44). The motion to dismiss was denied by the lower court. (R. 102).

A motion for summary judgment was made in September of 1981 by the plaintiffs. (R. 108). A hearing was held in the lower court on October 16, 1981 at which time the parties

agreed that Defendants' prior motion for dismissal could be treated as a motion for summary judgment. (Tr. 45). The lower court determined that the contract was not ambiguous and ordered Defendants to execute all necessary documents to transfer all right, title, and interest in the property at the time Plaintiffs tendered to Defendants the monetary difference existing between the Pope Contract balance and the Thorpe Contract balance. (R. 135-136).

The court also ordered each side to bear its own costs and attorneys' fees. (R. 136). The reason for this ruling was stated by the lower court at the hearing as follows:

Well, as far as I am concerned, the court finds that the plaintiffs prepared the contract and I am not going to grant attorneys' fees in this matter; I am not going to grant costs. I feel that's laying it on top and I am not going to do it. I am making a specific finding for no attorneys' fees and costs awarded in this matter. (Tr. 49).

On November 25, 1981 Defendants filed their Notice of Appeal from the lower court order. On December 14, Plaintiffs filed a cross-appeal as to the failure of the lower court to award costs and attorneys' fees. (R. 153). On this same date the lower court granted a stay until final determination of the appeal. (R. 151).

#### ARGUMENT

#### POINT I

THE FARNSWORTH-THORPE REAL ESTATE CONTRACT WAS

NOT AMBIGUOUS AND THEREFORE SUMMARY JUDGMENT  
WAS PROPER.

Defendants-Appellants argue that summary judgment was improper in this case since the Thorpe Contract was ambiguous and required extrinsic evidence to determine the intention of the parties. (Appellants' Brief, pp. 6-9). This argument, however, is without merit since the real estate contract is not ambiguous and therefore requires no factual determination.

Respondents do not disagree with the authorities cited by Appellants as to the standard of review for summary judgment and for interpretation of written contracts. (Appellants' Brief, pp. 6-7). These authorities cited by Appellants clearly state that a contract must be interpreted within its own four corners unless it is "ambiguous" and extrinsic facts are required to determine the intent of the parties.

Whether a contract is ambiguous or uncertain is a question of law to be initially determined by the trial court. Evenson Masonry, Inc. v. Eldred, 543 P.2d 663 (Ore. 1975). The lower court in this case specifically held that the contract was not ambiguous. (Tr. 48).

Language in a contract is "ambiguous" when the words used to express the meaning and intention of the parties are insufficient in that the contract may be understood to reach two or more possible meanings. First National Bank of Olathe v. Clark, 602 P.2d 1299 (Kan. 1979). Ambiguity in a contract

is the effect of words that have either no definite sense or have more than one, causing doubt by reasonable men of its meaning. Bartlam v. Tikka, 622 P.2d 1130 (Ore. App. 1981). See also, Amoco Production Co. v. Stauffer Chemical Co. of Wyoming, 612 P.2d 463 (Wyo. 1980); State v. Fairbanks North Star Borough School District, 621 P.2d 1329 (Alaska 1981).

Two other rules of construction should also be noted. First, courts will not torture words and phrases to import ambiguity where their ordinary meaning leaves no room for ambiguity. Lampley v. Celebrity Homes, Inc., 594 P.2d 605 (Colo. App. 1979). Second, the mere fact that parties urge diverse definitions of contract terminology or differing contract interpretations does not render the contract ambiguous. Land v. Land, 605 P.2d 1248 (Utah 1980); Jones v. Hinkle, 611 P.2d 733 (Utah 1980).

A review of the Thorpe Contract shows that it is clearly not ambiguous. Appellants assert, to the contrary, that paragraph 6 is inconsistent with paragraph 8 in that paragraph 6 recognizes the Pope obligation and then states (in type) that it shall be the "seller's obligation to pay and discharge." Appellants assert that this is inconsistent with the language (in print) contained in paragraph 8 because it is unclear whether the Pope obligation is included as a "loan secured by said property." (Appellants' Brief, pp. 7-8). Appellants



..

further argue that "the parties apparently expressed their intent to exclude the Pope obligation from the applicability to paragraph 8 by the typed clause of paragraph 6." (Appellants' Brief, p. 8).

This argument is without substance. Paragraph 6 recognizes the Pope mortgage and provides that the seller is obligated to pay and discharge it. There is nothing unusual or ambiguous about this provision since it is merely stating that the sellers are responsible for the Pope loan and that as of the moment of contract it has not been assigned to the buyer as his obligation. Paragraph 8, on the other hand, states that at such time when the balance of any loan falls below the amount owed on the contract that the buyer can assume such loan and mortgage and that the sellers must convey title. There is no language contained in paragraph 8 excepting the Pope Contract from its provision.

This Court in Jones v. Hinkle, 611 P.2d 733 (Utah 1980) dealt with almost an identical argument advanced by the defendant in that case who also refused to convey title when the plaintiff buyer demanded it. This Court stated:

Paragraph 3 of the contract provides for full payment each month "until contract balance is paid in full." Defendants argue that the typewritten language of paragraph 3 of the contract supercedes the printed language of paragraph 8. It is defendants' position that the parties contemplated a continuing contract until the full purchase price was paid. If this

position were correct, paragraph 8, providing for conveyance of title before full payment of the purchase price, would have no meaning. It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions. Vance v. Arnold, 114 Utah 463, 201 P.2d 475 (1949).

This Court then continued to explain why paragraph 8 was applicable. It stated:

Although paragraph 3 of the real estate contract sets out the basic payment scheme, it does not mandate specified monthly payments as the only method of making payment. Paragraph 4 provides for the payment of amounts in excess of the regular monthly payments, and accelerated payments are allowed by paragraph 9 of the contract. It is significant that paragraph 9 expressly refers both to loan obligations outstanding at the date of the contract and to obligations incurred after the execution of the contract. Paragraph 8 applies to "any" loan secured by the property and does not expressly exclude the existing mortgage identified in paragraph 6. In our view, paragraph 3 does not preclude the right to conveyance of title pursuant to paragraph 8 according to the clear terms of that provision and in light of the language of paragraph 9. Id. at 735. (Emphasis added).

Here, there is nothing in the contract which precludes the buyer from assuming the sellers' obligation to pay and discharge the Pope Contract. There is no language contained in paragraph 8 excluding the Pope mortgage as a "loan" as contained in that paragraph. Just as in Hinkle, the agreement in this case is not ambiguous and clearly allows the assumption of the existing Pope mortgage at such time as the balances conformed with the requirements of paragraph 8.

Next, Appellants attempt to argue that the initial

balances between the Pope Contract and the Thorpe Contract indicate an ambiguity since at the time of the contract the Pope balance was only slightly higher than the Thorpe balance and therefore Clause 8 would have taken effect immediately. (Appellants' Brief, pp, 8-9). This argument is also without merit.

First, there is nothing contained in the contract itself which shows the balance of the Pope Contract and therefore any after-acquired escrow balances are extrinsic evidence which is not admissible unless the contract itself is ambiguous. Second, the initial balances of the contract changed almost immediately and as stated by Defendants themselves, in September and November of 1980 the Pope obligation was some \$4,000 below the Thorpe obligation. (R. 86). Plaintiffs in November of 1981 tendered the then-existing difference of some \$6,000 to the defendants in order to equalize the contract which would then activate the language contained in paragraph 8. (R. 133-134). It is clear that the structure of the contracts provided for a fluctuation in the difference between the two balances and therefore the initial balances are no more relevant to the intent of the parties than are the balances three or four years subsequent to the agreement.

There is no evidence that the underlying Pope balance



was ever considered in the Thorpe Contract or that Thorpe or the plaintiffs had any knowledge of the balance. It is submitted, however, that such a determination as to the actual balances or the knowledge of the parties as to the balances is irrelevant since the contract itself is unambiguous and the balances are extrinsic to the specific terms of the contract.

Finally, Appellants misconstrue the Bullough case (Appellants' Brief, p. 9) in that the conduct of the parties only becomes relevant after it has been determined that the underlying contract is ambiguous and only then will the court look to extrinsic factors to determine what the contract meant. In this case, however, there is no patent ambiguity and there is nothing in the agreement which precludes Plaintiffs from assuming the Pope Contract and from requiring Defendants to convey title subject to such assumption.

The lower court was correct, therefore in concluding that no ambiguity existed and that the matter was ripe for summary judgment.

## POINT II

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS SINCE THE CONTRACT PROVISIONS CLEARLY REQUIRED CONVEYANCE BY DEFENDANTS OF THEIR INTEREST IN THE SUBJECT PROPERTY.

Appellants state that the lower court relied heavily upon this Court's decision of Jones v. Hinkle, 611 P.2d 733 (Utah

1980). (Appellants' Brief, p. 10). This "reliance" was certainly justified since the Hinkle case is almost identical to the present controversy. As will be discussed infra, Appellants' attempts to distinguish it are to no avail.

In Hinkle a purchaser brought action for specific performance of a real estate property contract. The lower court entered summary judgment in favor of the sellers and the purchasers appealed. Both parties had moved for summary judgment in the lower court.

The contract in Hinkle concerned residential property located in Utah County. The seller had a previous outstanding mortgage with a savings and loan institution. In paragraph 6 of the identical real estate contract utilized in this case it was stated, "It is understood that there presently exists an obligation against said property in favor of Deseret Federal Savings & Loan with an unpaid balance of \$31,836.78 as of May 1, 1977." The plaintiff made monthly payments and one balloon payment in accordance with the terms of the contract and then notified the defendants that since the balance on the outstanding mortgage was below her contract price that the sellers should convey title pursuant to paragraph 8 subject only to the outstanding mortgage. The defendants refused to transfer title.

This Court rejected the argument that paragraph 8 only

applied to obligations assumed after the contract's initiation and stated that it specifically applied to "any" loan secured by the property and does not exclude existing mortgages. This Court held that paragraph 8 was conditioned solely upon the reduction of the unpaid principal to the amount of the outstanding obligations and that once this amount had been met defendants were obligated to convey in accordance with the terms of the contract.

The purpose of paragraph 8 is to allow a seller who retains title to the property the benefit of the property by being able to still maintain or secure additional loans based upon the property as security. However, the provision prevents the seller from encumbering the property in excess of the value of the contract thereby protecting the buyer from having encumbrances placed upon the property which are in excess of the seller's interest.

As noted earlier, no attempt was made to modify either paragraph 6 or paragraph 8 to exclude the Pope obligation from the terms of paragraph 8. It should be noted, on the other hand, that the defendants in their contract with Pope specifically precluded the sellers (Popes) from securing any other additional loans besides the two outstanding obligations already present at the time of sale. (R. 10). In this case, however, no such language was contained and therefore the

the defendants (who are now the sellers) were free to obtain additional loans on the property at any time the Pope obligation dipped below the contract balance owing on the Thorpe Contract. In other words, the defendants had specifically entered into provisions of a similar nature in the earlier Pope Contract and therefore could just as easily have limited the remedies available to the plaintiffs in the Thorpe Contract had they so desired.

Appellants argue that the contract is not "free from ambiguity" as in Hinkle. (Appellants' Brief, p. 10). Again, however if the language in the Hinkle case is examined and compared with the language in the instant case there is no ambiguity. Instead Appellants insist that this Court must "look behind the contract to other relevant documents and extraneous evidence" (Appellant Brief, p. 10) which requires, according to Appellants, that the Pope obligation be excluded from paragraph 8. As noted in the prior section, however, courts do not attempt to create ambiguity by looking to extrinsic evidence but rather look to extrinsic evidence to resolve ambiguities present in the contract language itself. Here, there is no such contractual ambiguity.

Appellants attempt by extrinsic arguments to show why the Pope obligation was excluded from the paragraph language. Again, these arguments are completely irrelevant unless the

document itself is ambiguous. However, even assuming relevance arguendo the arguments do not support Defendants' claim that the Pope obligation was meant to be excluded from the paragraph 8 language.

First, Defendants argue that because the Pope Contract included three houses which the Thorpe Contract did not that the parties could not have intended the Pope obligation to be included in paragraph 8. Appellants state: "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." (Appellants' Brief, p. 11). This statement completely ignores the fact that the Defendants had already divided and segregated the three houses from the remainder of the property when they sold the motel, restaurant, and trailer park to the plaintiffs. The legal descriptions contained in the Thorpe Contract (R. 4) is completely different from that contained in the Pope Contract. (R. 21-22).

Paragraph 8 only required Defendants to deed to Plaintiffs their interest in the property contained in the Thorpe Contract. Defendants would not have been required to deed their interest in the three houses since they were not included in the Thorpe Contract and were not being purchased by Plaintiffs. Thus, Defendants would have given up nothing as to these three houses nor was there any "practical" problem involved since a division had already occurred.



Next, Defendants assert that since other property was secured in the Pope Contract it would have been unfair to allow Plaintiffs to assume the obligation. Again, however, such argument makes no sense. Defendants agreed to give to the Popes liens on other real property in addition to the motel, cafe, and trailer park involved in the transaction. The contract provided that when the balance owing reached \$230,000 that the first property would be released and that upon reaching \$200,000 the second property would be released. (R. 10). The Popes were obligated to release these properties regardless of whether the balance was reduced by the payments coming from Defendants or coming from Plaintiffs. Had Plaintiff defaulted in their payments Defendants would have again assumed the contract and continued to make payments. In any event, however, the defendants had agreed in the Pope Contract to a specified payment and time schedule and the assumption by Plaintiffs, therefore, would not have altered this payment or time schedule in any way.

The most that Defendants can complain about is the fact that had they continued to receive the accelerated balloon payments of Plaintiffs under the Thorpe Contract the defendants could have obtained a release of their properties sooner. However, there is nothing in any of these contracts which requires an earlier release or which states that Defendants

must apply the accelerated payments coming from Plaintiffs to the Pope Contract for the purpose of accelerating the release of the two other properties.

Finally, the same argument is advanced by Defendants that the assumption of the contract by Plaintiffs will preclude the release of the three houses contained in the Pope agreement but excluded in the Thorpe agreement. (Appellants' Brief, pp. 11-12). Again, there is no contractual language in either contract giving Defendants a right to the early release of these three properties. It was completely optional on the part of Defendants whether they wished to accelerate payments under the Pope agreement or whether they wished to continue under the payment schedule provided.

Likewise, there is nothing contained in the Thorpe Contract which conditions the accelerated balloon payments of Plaintiffs for the purpose of paying off the Pope obligation in an expedited manner. While Defendants may well have intended on applying the payments received from Plaintiffs entirely to the Pope Contract there was no contractual obligation to so do. Plaintiffs cannot be now penalized simply because Defendants' intention may have been thwarted by their failure to provide contractual language to effectuate this claimed desire.

The preceding attempts to distinguish the Hinkle case

must fail. None of these extrinsic facts or supposed desires of the defendants are contained in the contract itself. The contract simply and plainly requires Defendants to convey their interest in the contracted for property at the time when the Pope obligation and the Thorpe obligation become equal. There is no doubt that this fact occurred or would have occurred had the defendants accepted the tender made by Plaintiffs to equalize the balances. Thus, just as in Hinkle, the lower court was correct in granting summary judgment and requiring the defendants to convey their interest in the property subject to the Pope obligation.

### POINT III

THE LOWER COURT ERRED IN REFUSING TO AWARD ATTORNEYS' FEES AND COSTS AND THIS COURT SHOULD ALSO AWARD ATTORNEYS' FEES AND COSTS.

The lower court refused to grant to Plaintiffs attorneys' fees or costs on the assumption that Plaintiffs had prepared the document and therefore were not entitled to these expenditures. (Tr. 49). The respondents have cross-appealed from this denial since the lower court was clearly erroneous in precluding attorneys' fees and costs.

First, the fact that Plaintiffs prepared the agreement is irrelevant for purposes of determining attorneys' fees. The question of who drafted an instrument is only germane when an ambiguity exists in the language and then only to the



extent that a presumption is made against the drafter. Here, the lower court specifically found no ambiguity as to the assumption provision and Defendants did not ever argue an ambiguity as to the attorneys' fees and costs provisions. Thus, the facts that Plaintiffs prepared the contract by filling in the printed form is completely irrelevant to an award of attorneys' fees and costs.

Second, Defendants argue that the language contained in the contract only permits attorneys' fees for a "default" and that the court did not declare a default or breach of contract by Appellants as pled by Respondents in their Complaint. (Appellants' Brief, p. 13).

This argument attempts to put form over substance. Obviously, the court found that the defendant had breached their obligation to convey the property to Plaintiffs and ordered such conveyance to occur. It is not necessary for the court to specifically make a finding of a default or breach in a motion for summary judgment. This Court in the Hinkle case specifically held that attorneys' fees and costs were required in a dispute involving the identical clauses. This Court stated:

As to the award of attorneys' fees to defendants, we reverse the trial court and direct it to award such fees to plaintiffs. The contract provides that the defaulting party shall pay costs and expenses, including a reasonable attorneys' fees incurred in

enforcing the agreement. Defendants were in default for their failure to convey title pursuant to Paragraph 8, and they are therefore liable to Plaintiffs for the expenses of this action. 611 P.2d 733, 736 (Utah 1980).

Finally, Appellants rely upon the case of Swain v. Salt Lake Real Estate and Investment Co., 279 P.2d 709 (Utah 1955) to state that attorneys' fees on appeal are discretionary with the Supreme Court. This reliance is misplaced since this Court specifically overruled the Swain decision in Management Services Corp. v. Development Associates, 617 P.2d 406 (Utah 1980). The Court stated the following concerning a question of attorneys' fees on appeal in an action involving a real estate contract:

The parties here agreed to pay reasonable attorneys' fees if it became necessary to enforce the contract. If plaintiff is required to defend its position on appeal at its own expense plaintiff's rights under the contract are thereby diminished. We therefore adopt the rule of law that a provision for payment of attorneys' fees in a contract includes appeal as well as at trial, if the action is brought to enforce the contract, and overrule Swain and Downey State Bank on this point insofar as they may be to the contrary. Id. at 409.

The lower court erred in failing to award a reasonable attorneys' fee and costs to Plaintiffs. In addition, this Court should remand to the lower court for a determination as to reasonable attorneys' fees and costs of this appeal.

#### CONCLUSION

Summary Judgment was developed as a means to eliminate

an unnecessary trial when no question of fact exists. Here, there can be no doubt that summary judgment was proper unless it can be said that a factual dispute is present. A factual dispute is present only if this Court accepts Defendants' argument that the contract on its face is ambiguous and requires extrinsic factual evidence to determine the intent of the parties.

The contract on its face, however, as a matter of law is not ambiguous. Paragraph 6 and paragraph 8 are not inconsistent. Paragraph 6 merely states that Defendants were obligated to make the payments as to the Pope Contract thereby eliminating any question as to who should make these underlying obligation payments. However, paragraph 6 does not in any way negate the effect of paragraph 8 which permits a transfer of title upon the assumption by Plaintiffs of the underlying obligation when the balances of the two contracts have equalized.

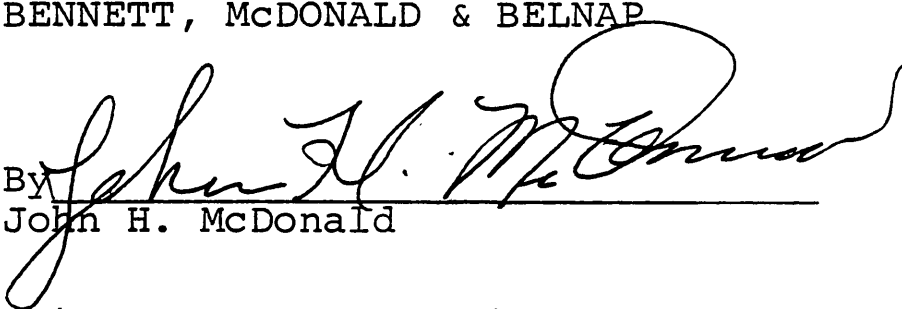
The lower court was correct in finding that no ambiguity existed in the contract language. Further, the court correctly applied the terms of the contract in accordance with this Court's decision in Hinkle. The supposed distinction between this case and Hinkle are completely without merit and the Hinkle case is binding precedent to the very issue now being litigated.


Finally, the lower court erred in failing to follow the Hinkle decision as to attorneys' fees and costs and Plaintiffs-Respondents are clearly entitled to these awards in order to prevent a penalty being levied against them for enforcement of their contract. Likewise, this Court should order a remand for purposes of determining reasonable attorneys' fees and costs of this appeal.

Respectfully submitted,

BENNETT, McDONALD & BELNAP

By

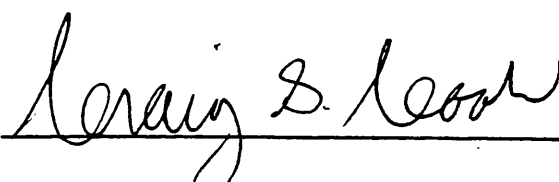
  
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#### MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Respondents to Robert F. Orton, Marsden, Orton & Liljenquist, 68 South Main, Fifth Floor, Salt Lake City, Utah 84101, Attorneys for Defendants-Appellants, this 26th day of July, 1982.

  
CRAIG S. COOK