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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NICK FAULKNER and KARYL
FAULKNER, his Wife,

Respondents,

vs.

CASE NO. 18142

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

Appellants.

REPLY BRIEF OF APPELLANTS

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

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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	3
A. DEMONSTRATED BY THE LANGUAGE OF THE WRITING ITSELF AND THE PARTIES' CONDUCT THEREUNDER, AMBIGUITIES EXIST IN THE "THORPE" CONTRACT THAT REQUIRE THE ADMISSION OF EXTRINSIC EVIDENCE TO RESOLVE MATERIAL ISSUES OF FACT	3
B. UNDISPUTED FACTS DISTINGUISH THE INSTANT CASE FROM <u>JONES V. HINKLE</u> AND PREVENT A PROPER GRANTING OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS	7
C. AN AWARD OF ATTORNEY'S FEES WAS PROPERLY REFUSED BY THE LOWER COURT, AND NONE SHOULD BE GRANTED ON APPEAL	10
VI. CONCLUSION	12

AUTHORITIES CITED

Cases

<u>Bullough v. Sims</u> , 16 Utah 2d 304, 400 P.2d 20, 22 (1965)	5
<u>E. A. Strout Western Realty Agency, Inc. v. Broderick</u> , 522 P.2d 144 (Utah 1974)	3, 5

TABLE OF CONTENTS - Continued

	<u>Page</u>
<u>Fox Film Corporation v. Ogden Theatre Co., 82</u> <u>Utah 279, 17 P.2d 294 (1932)</u>	4, 5
<u>Jones v. Hinkle, 611 P.2d 733 (Utah 1980)</u>	7,8,11
<u>Kennedy v. Griffith, 98 Utah 183, 95 P.2d 752</u> <u>(1939).</u>	4
<u>Management Services Corp. v. Development</u> <u>Associates, 617 P.2d 406 (Utah 1980).</u>	11
<u>Swain v. Salt Lake Real Estate and Investment</u> <u>Company, 3 Utah 2d 121, 279 P.2d 709 (1955)</u>	10,11

Other Authorities

30 Am. Jur. 2d, <u>Evidence</u> § 1069 (1967).	3, 4
30 Am. Jur. 2d, <u>Evidence</u> § 1073 (1967).	4

IN THE SUPREME COURT
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NICK FAULKNER and KARYL :
FAULKNER, his Wife, :
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 Respondents, :
 :
 vs. :
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 F. CARL FARNSWORTH and :
 ANN H. FARNSWORTH, his Wife; :
 and JON LEE TORGERSON and :
 MAVIS TORGERSON, his Wife, :
 :
 Appellants. :

REPLY 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

In their initial Brief, Appellants set forth a concise Statement of relevant Facts supported by the record on file herein. Notwithstanding Respondents' objections thereto, Appellants believe that said Statement accurately relates only relevant and material facts including those to which counsel for Respondents stipulated at the hearing held on October 16, 1981. (Transcript 22). Additional facts set forth in Respondents' Brief, while fairly accurate, tend to confuse the simple issues rather than isolate them. Therefore Appellants will rely on their prior proffered Statement.

V. ARGUMENT

- A. DEMONSTRATED BY THE LANGUAGE OF THE WRITING ITSELF AND THE PARTIES' CONDUCT THEREUNDER, AMBIGUITIES EXIST IN THE "THORPE" CONTRACT THAT REQUIRE THE ADMISSION OF EXTRINSIC EVIDENCE TO RESOLVE MATERIAL ISSUES OF FACT.

The basic legal principles concerning the relationship of ambiguities and the parol evidence rule have been ably presented in both Appellants' and Respondents' Briefs. The remaining question concerns applicability to the "Thorpe" Contract of those recited principles. Appellants do not seek to have the Court "torture words and phrases to import ambiguity," nor do they expect such a finding at the mere urging of "differing contract interpretations." (Respondents' Brief at 8.) Rather, Appellants request that the Court examine the contractual language of the "Thorpe" Contract to ascertain what those written words stand for in connection with the particular conduct of the parties. E. A. Strout Western Realty Agency, Inc. v. Broderick 522 P.2d 144, 146 (Utah 1974).

In determining whether an ambiguity exists in a document, the test lies, not necessarily in the presence of isolated ambiguous words or phrases, but in whether or not those otherwise plain words become uncertain when applied to

the subject matter of the instrument. 30 Am. Jur. 2d, Evidence § 1069 (1967). It is generally held that "latent" ambiguities may be clarified by parol evidence. Kennedy v. Griffith, 98 Utah 183, 95 P.2d 752, 753 (1939). A latent ambiguity is an uncertainty which does not appear on the face of the instrument, but which is shown to exist for the first time by matter outside the writing. 30 Am. Jur. 2d, Evidence § 1073 (1967).

Utah has historically recognized the need to accept extrinsic evidence to explain a latent ambiguity in a writing. This Court in Fox Film Corporation v. Ogden Theatre Co., 82 Utah 279, 17 P.2d 294, 296 (1932), stated:

One well-recognized exception to the rule is that extrinsic evidence, parol or otherwise, is admissible to explain a latent ambiguity in a writing. This does not mean that terms or conditions may be inserted into or taken out of the writing by direct oral assertions, but it does mean that the court may receive evidence of such surrounding facts as will enable it to look upon the transaction through the eyes of the parties thereto and thereby know what they understood or intended the ambiguous word or provisions to mean.

The Court went on to remark that where the conduct of the parties pursuant to a written agreement demonstrate an ambiguity in the interpretation of said agreement, it is "necessary for the court to know as much as the parties at

the time of signing knew about the subject matter." This enables the court, "so far as necessary, to see the transaction through the eyes and understanding of the parties." Id.

Although old law, Fox Film continues to be valid law in Utah. In Bullough v. Sims, 16 Utah 2d 304, 400 P.2d 20, 22 (1965), this Court followed precedent and held that parol evidence was admissible, notwithstanding the clear and otherwise certain language of the agreement, to show that the actions of the parties demonstrated ambiguity in the intended contractual relationship.

Defendants argue that the terms of the April 6, 1932, agreement are unambiguous and provide for a present sale as of that date, and that parol evidence cannot alter or change its plain meaning. This is generally true, but there are exceptions; one of which is that when the parties place their own construction on it and so perform, the court may consider this as persuasive evidence of what their true intention was.

As recently as in E. A. Strout Western Realty Agency, Inc. v. Broderick 522 P.2d 144, 145-46 (Utah 1974), this Court cited Fox Film for its parol evidence holding and stated:

Written words can be examined so as to ascertain what they stand for in connection with particular conduct or particular objects. Thus expressions of the parties prior to and contemporaneous with the execution of a written instrument may be helpful in understanding the meaning of the language used. However, the defendant here does not seek to explain the meaning of a paragraph. He simply wants the court to eliminate it in its entirety. This the courts cannot do.

Appellants have no desire to eliminate the ambiguous portions of the "Thorpe" Contract. Rather, Appellants assert that the apparent incongruity between paragraphs 6 and 8 of said agreement becomes obvious upon examination of the surrounding circumstances of the parties at the time of contracting.

In their Brief, Respondents attempt to eliminate any consideration by the Court of the intentions of the parties at the time of execution of the "Thorpe" Contract. They deem the respective balances of the "Pope" Agreement and the "Thorpe" Contract irrelevant to the conflict at hand. (Respondents' Brief at 11). Conversely, Appellants assert that since the crux of this case is the applicability of paragraph 8 of the "Thorpe" Contract to the "Pope" Agreement, a more relevant piece of evidence could not be imagined than the respective balances of the two Sales Contracts.

If in fact at the time of its execution (as stipulated by Respondents (T. 12-13)), the "Thorpe" Contract balance was less than the unpaid balance on the "Pope" Agreement, the intentions of the parties to exclude the "Pope" obligation from applicability to paragraph 8 are demonstrated and easily understood. Had the parties intended to so affect the "Pope" obligation, Respondents would have requested and Appellants

would have conveyed title to the subject property immediately. Instead, the parties commenced a regular course of conduct whereby the agreements were maintained separately with the outstanding balances decreasing at different rates of speed.

The apparent conflict between paragraphs 6 and 8 becomes unavoidable with an understanding of the actions of the parties. The typed clause ending the acknowledgement of the "Pope" obligation in paragraph 6, "which shall be the Sellers obligation to pay and discharge" was clearly meant to exempt that obligation from its applicability to paragraph 8. Respondents complain that "[t]here 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." (Respondents' Brief at 11-12). Appellants agree with Respondents' complaint; by failing to admit or consider such evidence, the District Court erred by granting Summary Judgment.

B. UNDISPUTED FACTS DISTINGUISH THE INSTANT CASE FROM JONES V. HINKLE AND PREVENT A PROPER GRANTING OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

In their Brief, Respondents assert that the instant case is "almost identical" to this Court's decision of Jones v. Hinkle, 611 P.2d 733 (Utah 1980) and attempt to explain away

important distinguishing facts. (Respondents' Brief at 12-14). In doing so, however, Respondents fail to understand that the bases of dispute in this matter are the specific points which distinguish this action from Hinkle.

Although the Contract in Hinkle was created from the same form used for the "Thorpe" Contract, the supplementation of the "Thorpe" paragraph 6 is unique and stands as the basis in writing for the ambiguous treatment of the "Pope" obligation. Appellants and Respondents desiring to demonstrate their intent not to include the "Pope" obligation in the assumability provision of paragraph 8, added that said obligation "shall be the Sellers obligation to pay and discharge." No such additional clause is found in the Hinkle Contract.

From a careful reading of the facts in Hinkle, it is apparent that at the time of execution of that Contract, the balance of the underlying obligation was well under the Contract price. As discussed supra, the comparative balances at the time of execution of the "Thorpe" Contract, together with the subsequent actions of the parties, unambiguously demonstrate that the "Pope" obligation was never meant to be assumed by Respondents.

Notwithstanding Respondents' contentions to the contrary, the fact that the "Pope" Agreement included additional

properties unincorporated in the "Thorpe" Contract is relevant and material to the contractual intentions of the parties. Title to the entire property, subject of the "Pope" Agreement, does now rest and at all times since the execution thereof has rested with the Sellers under that Agreement. Notwithstanding the provisions of paragraph 8 of the "Thorpe" Contract and any alleged applicability thereof to the "Pope" obligation, Appellants are without title to convey to Respondents. It may by Quit Claim Deed, transfer its interest to said property, but it cannot convey title which it does not hold. In this respect "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." (Respondents' Brief at 16).

Related to the above distinguishing problem and relevant as to the parties original intentions is the matter of security offered for the "Pope" Agreement by Appellants. The "unincorporated" portion of the "Pope" property and the additional properties required in the "Pope" Agreement to be offered by Appellants as security therefore would be unfairly encumbered by the assumption of the obligation by Respondents. Extrinsic evidence refused by the District Court would have shown that the intentions in and purposes of Appellants

entering into the "Thorpe" Contract concerned to a great extent the comparative payment schedules of the two Contracts. By applying the balloon payments from the subsequently negotiated "Thorpe" Contract directly to the "Pope" Agreement, said obligation would be satisfied on an accelerated basis freeing the "other" encumbered properties by as much as 12 years earlier than otherwise scheduled.

While Appellants rely upon none of the above distinguishing factual assertions exclusively as sufficient to require Summary Judgment to be rendered in Appellants' favor, taken as a whole, and uncontested as they stand, these specific points distinguish the present case from Hinkle and require the Court to examine the contractual intentions of the parties before rendering judgment.

C. AN AWARD OF ATTORNEY'S FEES WAS PROPERLY
REFUSED BY THE LOWER COURT, AND NONE
SHOULD BE GRANTED ON APPEAL.

Although Respondents rightfully take issue with Appellants' citation of Swain v. Salt Lake Real Estate and Investment Company, 3 Utah 2d 121, 279 P.2d 709 (1955) for the proposition that attorney's fees on appeal are discretionary with the Supreme Court, Respondents fail to adequately analyze the District Court's refusal to award attorney's fees at trial.

Counsel apologizes for its use of the overruled Swain in its prior Brief, but recognizes an important

distinction between Management Services Corp. v. Development Associates, 617 P.2d 406 (Utah 1980), and the present case. In Management Services the Court overruled Swain and included an award of attorney's fees incurred by the prevailing party on appeal, but did so only after the District Court had found that such an award was proper at trial.

The District Court here found no default committed by the Appellants requiring an award of attorney's fees. The Court merely determined the rights and obligations of the respective parties. Any possible default could be committed only following the reduction of the "Thorpe" Contract to an amount less than that of the "Pope" Agreement. At no time did Respondents demand conveyance of any interest when they were so entitled, assuming, arguendo, that the "Pope" obligation was assumable.

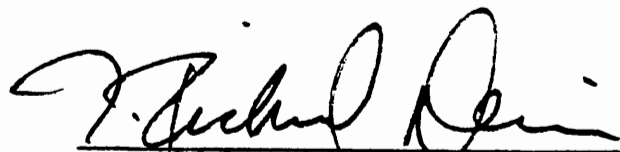
In Jones v. Hinkle 611 P.2d 733 (Utah 1980), unlike the present case, there were undisputed facts which required an award of attorney's fees to accompany the Judgment. There, both parties agreed that the Hinkle Contract had been paid down to a balance below that of the underlying obligation. The Court found that upon Seller's refusal of Buyer's demand for conveyance, the Seller had defaulted in its obligations, thus attorney's fees were properly awarded the non-defaulting

party. As Respondents did not make their demand at a time when Appellants might have been required to convey, Appellants were not found in default. Therefore an award of attorney's fees is inappropriate either in the lower Court or on appeal.

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 8 day of September, 1982.



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MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing
REPLY BRIEF OF APPELLANTS to John H. McDonald, BENNETT,
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City, Utah 84111, and to Craig S. Cook, 3645 East 3100 South,
Salt Lake City, Utah 84109, this 8 day of September, 1982.