

1990

# William R. Kelley, Jr. v. Leucadia Financial Corporation : Amicus Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

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

David R. Olsen, Charles P. Sampson, Paul A. Simmons; Suitter, Axland, Armstrong and Hanson; R. Paul Van Dam; Attorney General; David W. Lund; Assistant Attorney General; D. Frank Williams, David W. Johnson; Attorneys for Petitioner.

John A. Snow, Kathryn H. Snedaker; Van Cott, Bagley, Cornwall, and McCarthy; Attorneys for Respondent.

---

## Recommended Citation

Legal Brief, *William R. Kelley, Jr. v. Leucadia Financial Corporation*, No. 900187.00 (Utah Supreme Court, 1990).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/2991](https://digitalcommons.law.byu.edu/byu_sc1/2991)

This Legal Brief 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 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.

900187 IN THE UTAH SUPREME COURT  
DOCKET NO. \_\_\_\_\_

---

WILLIAM R. KELLEY, JR.,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
vs.	)	Case No. 900187
	)	
LEUCADIA FINANCIAL CORPORA-	)	Priority No. 14
TION, a Delaware corporation,	)	
	)	
Defendant-Respondent.	)	

---

---

AMICUS CURIAE BRIEF OF THE UTAH ASSOCIATION OF REALTORS  
IN SUPPORT OF BRIEF OF PETITIONER

---

DAVID R. OLSEN, ESQ.  
CHARLES P. SAMPSON, ESQ.  
PAUL A. SIMMONS, ESQ.  
SUITTER AXLAND ARMSTRONG  
& HANSON  
175 South West Temple, #700  
Salt Lake City, Utah 84101  
(801) 532-7300  
Attorneys for Petitioner

JOHN A. SNOW, ESQ.  
KATHRYN H. SNEDAKER, ESQ.  
VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
50 South Main Street, # 1600  
Salt Lake City, Utah 84144  
(801) 532-3333  
Attorneys for Respondent

R. PAUL VAN DAM, ESQ.  
Attorney General  
DAVID W. LUND, ESQ.  
Assistant Attorney General  
130 Utah State Capitol;  
Salt Lake City, Utah 84144  
(801) 538-1019  
Attorneys for Amicus Curiae  
Division of Real Estate

D. FRANK WILKINS, ESQ.  
175 South Main Street  
Suite 1000  
Salt Lake City, Utah 84111  
(801) 531-1555  
DAVID W. JOHNSON, ESQ.  
P.O. Box 3598  
Park City, Utah 84060  
(801) 649-5602  
Attorneys for Amicus Curiae  
Utah Assoc. of Realtors

**FILED**

DEC 17 1990

---

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

---

WILLIAM R. KELLEY, JR.,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
vs.	)	Case No. 900187
	)	
LEUCADIA FINANCIAL CORPORA-	)	Priority No. 14
TION, a Delaware corporation,	)	
	)	
Defendant-Respondent.	)	

---

---

AMICUS CURIAE BRIEF OF THE UTAH ASSOCIATION OF REALTORS  
IN SUPPORT OF BRIEF OF PETITIONER

---

DAVID R. OLSEN, ESQ.  
CHARLES P. SAMPSON, ESQ.  
PAUL A. SIMMONS, ESQ.  
SUITTER AXLAND ARMSTRONG  
& HANSON  
175 South West Temple, #700  
Salt Lake City, Utah 84101  
(801) 532-7300  
Attorneys for Petitioner

JOHN A. SNOW, ESQ.  
KATHRYN H. SNEDAKER, ESQ.  
VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
50 South Main Street, # 1600  
Salt Lake City, Utah 84144  
(801) 532-3333  
Attorneys for Respondent

R. PAUL VAN DAM, ESQ.  
Attorney General  
DAVID W. LUND, ESQ.  
Assistant Attorney General  
130 Utah State Capitol;  
Salt Lake City, Utah 84144  
(801) 538-1019  
Attorneys for Amicus Curiae  
Division of Real Estate

D. FRANK WILKINS, ESQ.  
175 South Main Street  
Suite 1000  
Salt Lake City, Utah 84111  
(801) 531-1555  
DAVID W. JOHNSON, ESQ.  
P.O. Box 3598  
Park City, Utah 84060  
(801) 649-5602  
Attorneys for Amicus Curiae  
Utah Assoc. of Realtors

**PARTIES TO THE PROCEEDINGS BELOW**

The caption contains the names of all parties to the appeal in the Utah Court of Appeals. The defendant in the trial court was First Security Mortgage Company. After the final judgment was entered in the trial court, Leucadia Financial Corporation was substituted for First Security Mortgage Company as the defendant.

## TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES .....	ii
JURISDICTION .....	1
STATEMENT OF ISSUE PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE .....	1
I. Nature and Course of Proceedings .....	1
II. Statement of Material Facts .....	1
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	5
CONCLUSION .....	9

## TABLE OF AUTHORITIES

### Page

#### CASES

<u>Ace Realty, Inc. v. Looney</u> , 531 P.2d 1377 (Okla. 1974) .....	7
<u>Castagno v. Church</u> , 552 P.2d 1282 (Utah 1976) .....	6
<u>Eliason v. Watts</u> , 615 P.2d 427 (Utah 1980) .....	6
<u>Kelley v. Leucadia Fin. Corp.</u> , No. 880534-CA, slip op. (Utah Ct. App. Jan. 5, 1990) .....	5, 7
<u>Huck v. Hayes</u> , 560 P.2d 1124 (Utah 1977) .....	6
<u>Tanner v. Baadsgaard</u> , 612 P.2d 345 (Utah 1980) .....	6

#### STATUTES

Utah Code Ann. § 78-2-2(3)(a) .....	1
Utah Code Ann. § 78-2-2(3)(j) .....	1
Utah Code Ann. § 78-2-2(5) .....	1

## JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and (j) and 78-2-2(5) (1987).

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals correctly interpret the standard form Earnest Money Sales Agreement to preclude the buyer's right to specific performance?

## STATEMENT OF THE CASE

### I. NATURE AND COURSE OF PROCEEDINGS

The Utah Association of Realtors adopts the Petitioner's statement of the "Nature of the Case" and "Course of Proceedings" to the extent it is consistent with the "Statement of the Case" contained at pages 1-2 of the Brief of Respondent in Opposition to Petition for Writ of Certiorari ("Br. in Opp.").

### II. STATEMENT OF MATERIAL FACTS

1. The Utah Association of REALTORS<sup>1</sup> (UAR) is a non-profit corporation consisting of local boards of REALTORS, their members, and other licensed real estate professionals in this state. Its purposes include maintaining high standards of conduct in the real estate profession and exerting effectively a combined influence upon matters affecting real estate in this state. (See

---

<sup>1</sup> REALTOR is a federally registered collective membership mark.

Affidavit of L. Alma Mansell (previously filed with the Court), ¶¶ 3 & 4.)

2. The UAR and its member boards comprise approximately 3,500 real estate brokers and agents within the state of Utah. (Id. ¶ 3.)

3. The UAR is a member of the National Association of REALTORS, a national association designed to maintain high standards of conduct in the transaction of real estate business and to provide a facility for education, research and exchange of information for those engaged in the recognized branches of the real estate business. (Id. ¶ 5.)

4. The state of Utah, through the Utah Real Estate Commission, created pursuant to Utah Code Ann. § 61-2-5.5 (1953, as amended), and the Utah Attorney General, has prepared and approved a standard for Earnest Money Sales Agreement ("standard form"). The standard form must be used by all licensed real estate brokers and salesagents in real estate transactions conducted in this state, as provided in Utah Code Ann. § 61-2-20 (1953, as amended). The standard form is used in the vast majority of real estate transactions conducted by the members of the UAR. (See Affidavit of L. Alma Mansell ¶ 6.)

5. On or about February 20, 1987, First Security Mortgage Company, as seller, and William R. Kelley, Jr., as buyer, executed an Earnest Money Sales Agreement for the purchase and

sale of certain residential real property in Park City, Utah. (See Record ("R.") at 14-21.) The agreement was on the standard form approved by the Real Estate Commission of the state of Utah and the Utah Attorney General. (See Affidavit of L. Alma Mansell, App. "A" ¶ 6.)

6. Paragraph N of the Earnest Money Sales Agreement stated, in pertinent part:

Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

(R. at 17 ¶ N.)

7. Before closing, a survey disclosed that there was a boundary discrepancy. (See R. at 81, 143, 150.)

8. Also before closing, neighboring property owners cut off the water supply to the property, causing a poind on the property to dry up, thereby damaging the property. (See R. at 45, 50-53, 82.)

9. The petitioner, Mr. Kelley, brought this action seeking a declaration of the parties' respective rights and obligations under the Agreement, specific performance of the Agreement and damages for alleged breaches of the Agreement as described

above, and also tendered to the court the amount required to close the transaction. (See R. at 1-11, 68-71.)

10. The trial court granted Kelley summary judgment on his claim for specific performance. (See R. 562-64.)

11. First Security accepted Kelley's down payment and conveyed the property to Kelley. (See Brief of Respondent, No. 880534-CA (Utah Ct. App.), appendix A.)

12. Thereafter, Leucadia Financial Corporation was substituted as defendant for First Security and appealed the trial court's grant of summary judgment in favor of Kelley. (See R. 844-49.)

13. The issues on appeal were whether Kelley made a sufficient tender of performance by the closing date and, if not, whether the trial court erred in ordering specific performance. (See Brief of Appellant, No. 880534-CA (Utah Ct. App.) at 1.)

14. The Utah Court of Appeals did not reach the issues concerning Kelley's tender of performance but instead focused on paragraph H of the Agreement, regarding the respective rights of Buyer and Seller in the event a title defect was discovered. Paragraph H reads as follows:

H. **TITLE INSURANCE.** If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to

be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

15. The Court of Appeals concluded that Kelley's remedy under paragraph H was limited to a refund of his earnest money deposit, not specific performance, because title to the property could not be made insurable without exceptions for defects and because Kelley refused to waive any title defects. Kelley v. Leucadia Fin. Corp., No. 880534-CA, slip op. at 3 (Utah Ct. App. Jan. 5, 1990).

#### SUMMARY OF ARGUMENT

The interpretation given the standard form Earnest Money Sales Agreement by the Utah Court of Appeals improperly deprives buyers of their right to specific performance.

#### ARGUMENT

The decision of the Utah Court of Appeals that Mr. Kelley has asked the Court to review was based on that court's interpretation of the standard form. The standard form is a principal tool of the trade of the UAR's members. The UAR therefore has a critical interest in how the standard form is interpreted.

The UAR feels that, with respect to one significant provision of the standard form, paragraph H, the court's interpretation was either wrong or, at best, sufficiently unclear so as to cast doubt on the enforceability of the entire form. Of utmost concern is the court's apparent interpretation of that paragraph which could eliminate the right of a buyer to obtain specific performance from the seller.

This Court has consistently upheld a buyer's right to specifically enforce a purchase contract. See, e.g., Eliason v. Watts, 615 P.2d 427 (Utah 1980); Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980); Huck v. Hayes, 560 P.2d 1124 (Utah 1977) (under analogous facts). Yet, in its interpretation of paragraph H, the Court of Appeals has in effect said that, if there are title problems or damage to the property, the seller can refuse to correct them, and the buyer's only remedy is to waive the defect or damage, or walk away from the transaction. Under the court's interpretation of paragraph H, the buyer must waive any title defects and, of course, also waive any remedy he might otherwise have for such defects. Such a result is contrary to Utah law. See, e.g., Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976) ("The rule has long been established that a vendee has the right to insist upon performance by the vendor to the extent the latter is able to perform with an abatement in the

purchase price equal to the value of the deficiency or defect") (citations omitted).

In Ace Realty, Inc. v. Looney, 531 P.2d 1377 (Okla. 1974), the court found that a contractual provision substantially similar to paragraph H of the standard form, was provided for the benefit of the buyer rather than the seller. By allowing the buyer the right to obtain specific performance from the seller, with an abatement for a title defect, the seller would appropriately be denied the ability to defeat unilaterally a contract by refusing to correct a title defect.

Beyond the policy considerations associated with denying the seller the right to defeat a contract as stated in Ace Realty, Inc. v. Looney, 531 P.2d at 1381, there is the language in paragraph H of the standard form which reads, in pertinent part, as follows:

Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If the title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated.

(R. at 15 (emphasis added).)

In summary fashion the Court of Appeals apparently found that title could not be made insurable through an escrow at closing. See Kelley v. Leucadia Fin. Corp., No. 880534-CA,

slip op. at 3 (Utah Ct. App. Jan. 5, 1990). The facts relevant to that issue were never developed in the trial court.

An escrow at closing which adjusts the purchase price or reduces closing proceeds to the seller, is a very common and practical means of correcting a title defect. However, whether through an escrow at closing a seller could cure a title defect by means of an adjustment in the purchase price, is an appropriate factual question for a trial court to consider in a suit for specific performance. The record below reveals no such finding, which the UAR believes is vital.

The UAR believes that the Court of Appeals' interpretation of paragraph H is overly restrictive. The opinion does not suggest or intimate that under certain facts, specific performance with an abatement would be available as a remedy to a buyer. On the contrary, the opinion suggests that the only remedy ever available to a buyer under paragraph H, is to waive the defect or cancel the transaction. The condition precedent to that waiver or cancellation, e.g., that the title be uninsurable through an escrow at closing, was not expressly discussed or analyzed by the court.

The Court of Appeals' interpretation of paragraph H to deny Kelley specific performance in effect read paragraph N out of the standard form. Paragraph N allows a party to bring suit to enforce the agreement if the other party defaults in

any of the covenants or agreements contained in the standard form. The failure of a seller to convey clear title constitutes a default by the seller of its covenant to furnish "good and marketable title." Thus, under paragraph N, Kelley was entitled to bring an action to specifically enforce the agreement. If the consequence of his election to enforce the agreement under paragraph N meant that, under paragraph H, he was required to waive any title defect, then the court could tailor its order of specific performance accordingly. But that was never an issue before the Court of Appeals because First Security settled Kelley's claim that he was entitled to damages for First Security's failure to convey clear title.

#### CONCLUSION

The Court of Appeals' decision has serious implications for the real estate industry. Buyers consistently use the standard form to obtain loans to finance their purchases. If the interpretation of the standard form is unclear or if that form cannot be specifically enforced, as the Court of Appeals has implied, then real estate transactions using the standard form become uncertain, and lenders and the parties to the transactions cannot rely on the standard form as a binding contract.

Mr. Kelley filed this action to preserve whatever rights he may have had under the standard form. Yet merely by filing this action, under the Court of Appeals' decision, he lost his

right to purchase the property. Thus, the Court of Appeals' decision punishes buyers who seek the aid of a court to declare and enforce their rights under the standard form.<sup>2</sup>

For the foregoing reasons, the UAR believes that the Court should reverse the decision of the Utah Court of Appeals.

DATED this 17<sup>th</sup> day of December, 1990.

/s/  
D. FRANK WILKINS, Esq.  
DAVID W. JOHNSON, Esq.

\_\_\_\_\_  
(Original signature)

---

<sup>2</sup> The UAR takes no position on whether, under the facts of this case, First Security breached the agreement and whether Kelley was in fact entitled to damages. The parties' settlement of Kelley's damage claim moots those issues. But the UAR believes that the Court of Appeals erred in interpreting the standard form so as to deny specific performance to a buyer merely because he insisted on enforcing rights he thought he had under that form.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Amicus Brief of the Utah Association of REALTORS in Support of Brief of Petitioner were hand-delivered this 17<sup>th</sup> day of December, 1990, to:

John A. Snow, Esq.  
Kathryn H. Snedaker, Esq.  
VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
Attorneys for Appellant  
50 South Main Street, Suite 1600  
Salt Lake City, Utah 84144

R. PAUL VAN DAM, ESQ.  
Attorney General  
DAVID W. LUND, ESQ.  
Assistant Attorney General  
130 Utah State Capitol;  
Salt Lake City, Utah 84144  
Attorney for Amicus Curiae  
Division of Real Estate

David R. Olsen, Esq.  
Charles P. Sampson, Esq.  
Paul M. Simmons, Esq.  
SUITTER AXLAND ARMSTRONG & HANSON  
175 South West Temple, Suite 700  
Salt Lake City, Utah 84101  
Attorneys for Petitioner

/s/

\_\_\_\_\_  
(Original signature)