

1992

John Deere Company v. A & H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 920774 IN THE UTAH COURT OF APPEALS
OF THE STATE OF UTAH

JOHN DEERE COMPANY,	:	
Plaintiff-	:	Case No. 920774-CA
Respondent,	:	
vs.	:	Oral Argument
	:	Priority 16
A & H EQUIPMENT, INC.,	:	
WENDELL HANSEN, MARK B.	:	
ANDERSON, and VADA	:	
A. ANDERSON,	:	
Defendants-	:	
Appellants.	:	

BRIEF OF APPELLANT

Appeal from a Judgment of the Fourth Judicial District Court,
The Honorable Cullen Y. Christensen, District Judge, Presiding

D. DAVID LAMBERT (1872) and
LINDA J. BARCLAY (4967), for:
HOWARD, LEWIS & PETERSEN
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ATTORNEYS FOR PLAINTIFF-RESPONDENT

FILED

JAN 22 1993

COURT OF APPEALS

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JURISDICTIONAL STATEMENT

This appeal from a final judgment of the Fourth District Court was brought pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure. The final judgment was entered on September 21, 1992. (R. 370-71) Defendants' notice of appeal and undertaking on appeal were timely filed on September 28, 1992, (R. 372-77), within the thirty days allowed by Rule 4(a) of the Utah Rules of Appellate Procedure.

The appeal was filed with the Supreme Court, pursuant to its appellate jurisdiction over "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction," set forth in Utah Code Ann. § 78-2-2(3)(j) (1992). Pursuant to Utah Code Ann. § 78-2-2(4) (1991), this appeal was poured over to the Court of Appeals on November 17, 1992. (R. 383)

STATEMENT OF ISSUES

1. Did the trial court err in enforcing plaintiff's proposed settlement agreement when:

a. Its specific terms were never proposed nor agreed to by defendants?

b. It had not been previously filed with the court or entered upon the minutes of the court as required by Utah Code Ann. § 78-51-32 (1992) and Rule 4-504(8) of the Code of Judicial Administration?

2. If the settlement agreement is a valid contract, is it voidable as a consequence of counsel's unilateral mistake of fact?

3. If an agreement existed, did the trial court err in summarily enforcing it because its terms are ambiguous?

Standard of Review:

To the extent that the issues of this appeal involve a factual finding of the trial court, although the court did not appear to engage in any fact finding, a trial court's findings of fact will not be disturbed on appeal unless clearly erroneous. State v. Lovegren, 798 P.2d 767, 770 (Utah Ct. App. 1990); Utah R. Civ. P. 52(a). "Findings are clearly erroneous only when they are against the clear weight of the evidence or when the appellate court is convinced that a mistake has been made." Id. Further,

[t]o show clear error in a finding of fact, the challenging party must marshal all evidence supporting the finding, and show that the finding is nevertheless against the great weight of the evidence. Additionally, due regard must be given to the trial court's ability to judge the credibility of witnesses.

Merriam v. Merriam, 799 P.2d 1172, 1176 (Utah Ct. App. 1990) (citations omitted).

To the extent that the issues involve the trial court's conclusions of law, this Court may review the trial court's conclusions for correctness, affording them no deference. Tanner v. Phoenix Ins. Co., 799 P.2d 231, 233 (Utah Ct. App. 1990).

In general, settlement agreements are favored by the law because of the obvious benefits to both the parties and the judicial system. Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 607 (Utah 1979). It is also well established that a settlement agreement may be summarily enforced by a motion in the

court of the original action. Id. Utah Courts, therefore, will "affirm the granting of a motion to compel settlement if the record establishes a binding agreement and 'the excuse for nonperformance is comparatively unsubstantial.'" Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah Ct. App. 1989) (quoting Tracy-Collins Bank & Trust Co., 592 P.2d at 609).

DISPOSITIVE STATUTES

Utah Code Ann. § 78-51-32 (1992):

78-51-32. Authority of attorneys and counselors.

An attorney and counselor has authority:

(1) to execute in the name of his client a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding or final judgment rendered therein.

(2) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise.

(3) to receive money claimed by his client in an action or proceeding during the pendency thereof or after judgment, unless a revocation of his authority is filed, and, upon payment thereof and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Rule 4-504 of the Code of Judicial Administration:

Rule 4-504. Written orders, judgments and decrees.

Intent: To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgment or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's

counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

STATEMENT OF THE CASE

Procedure Below.

Plaintiff and appellee, John Deere Company, brought this civil action against defendants and appellants, A & H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson, on June 20, 1989. (R. 1-105) The trial court, Judge Cullen Y. Christensen of the Fourth Judicial District Court presiding, entered judgement on September 21, 1992 in favor of plaintiff on plaintiff's motion to enforce a settlement agreement purportedly entered into by the parties. (R. 370-71). Defendants appealed this order to the Utah Supreme Court on September 23, 1992. (R. 376-77) The Supreme Court subsequently poured the case over to the Utah Court of Appeals for disposition. (R. 379)

Statement of Facts.

Beginning in 1963, defendants Mark B. Anderson and Vada A. Anderson established an ongoing franchisor-franchisee relationship with plaintiff John Deere Co. (R. 136) In 1970, plaintiff, the Andersons, and defendants A & H Equipment and Wendell Hansen re-established the franchise. (R. 136) At the inception of the original 1963 franchise arrangement and, again, with the later franchise in 1979, plaintiff granted to defendants an exclusive

franchise territory covering six counties in Central Utah. (R. 136) On June 21, 1983, defendant A & H Equipment, by and through defendant Wendell Hansen, entered into a series of agreements with plaintiff in connection with the franchise. (R. 103-104) Over the next several years, defendants entered into additional agreements with plaintiff. (R. 103-104) The franchise arrangement also required defendants to enter into various agreements with an affiliate of plaintiff, Farm Plan, Inc. (Farm Plan) (R. 398) Farm Plan, although a separate company from plaintiff, (R. 390), was directly involved in plaintiff's franchisor-franchisee arrangements because it is the financing arm of plaintiff, much like G.M.A.C. is the financing arm for General Motors. (R. 398)

Because of a series of reverses in defendants' business, defendants were unable to pay some of their obligations to plaintiff and Farm Plan. (R. 133-136) As a consequence of defendants' failure to pay these obligations, some of which were based upon the same agreements that are exhibits in the present case, (R. 333), Farm Plan filed suit against A & H Equipment and Wendell Hansen in a case entitled Farm Plan Corp. v. A & H Equipment, et al. and Wendell Hansen, Fourth District Court Civil No. 980400905. (R. 333) Farm Plan was represented in this action by Kim Wilson. (R. 394) Defendants were not represented in the Farm Plan action by D. David Lambert, counsel for defendants in the present action, but entered into a stipulated settlement pro se. (R. 295-96, 333)

On June 1, 1989, judgment was entered against defendants in the amount of \$36,062.47 plus interest and costs in the Farm Plan action. (R. 295-96). This judgment, which will subsequently be referred to as the John Deere Farm Plan judgment, was entered pursuant to Farm Plan's ex parte motion and the stipulation of Farm Plan and defendants A & H Equipment, Inc. and Wendell Hansen. (R. 295-96, 333) During the times relevant to the present issues, Mr. Lambert was unaware of this judgment. (R. 395)

On June 20, 1989, plaintiff filed the present action against defendants, alleging that defendants had defaulted on various obligations under the franchise agreements. (R. 1-105) Plaintiff was represented in this action, again, by Kim R. Wilson and also by Brent Stephens. (R. 105)

Defendants, by and through their counsel in the present action, Mr. Lambert, answered plaintiff's complaint and filed a counterclaim which alleged that plaintiff had breached the parties' franchise agreements on numerous occasions by breaching its promise of an exclusive franchise territory, and had committed other tortious acts. (R. 130-137) The factual circumstances and issues raised in the counterclaim, including defendants' alleged defaults on the franchise agreements and plaintiffs' various tortious actions alleged by defendants, were the issues underlying not only the issues raised by plaintiff's complaint, but the Farm Plan action. (R. 398)

Nearly two years after the initiation of the present lawsuit, defendants advised Mr. Lambert that they would be willing to dismiss their counterclaim against John Deere in return for a complete resolution of all John Deere-related matters. (R. 333) Accordingly, on April 10, 1991, Mr. Lambert wrote a letter to John Deere's counsel and proposed such a settlement. (R. 333) The letter referred to the present lawsuit by name and stated, in relevant part, "I have been asked by my client to propose a settlement with your client in the above referenced case. The settlement proposal is a mutual dismissal with prejudice and a general release of claims with each party to bear their respective costs and fees." (R. 315) (Emphasis added.) When he proposed this settlement by means of this wording, Mr. Lambert's understanding was that a general release would release all outstanding matters between the parties, including all outstanding judgments. (R. 395)

Plaintiff's counsel accepted the offer by telephone on April 15, 1991. (R. 312-13) Specific terms of the release agreement were not discussed during this conversation. (R. 333) On April 22, 1991, plaintiff's counsel sent a letter confirming this conversation, stating, "This will confirm my telephone conversation of April 15, 1991, in which I accepted your settlement proposal contained in your letter of April 10, 1991. I will prepare the settlement documents and forward them to you for execution." (R. 309) No specific terms were discussed in this communication either.

On May 8, 1991, plaintiff's counsel sent documents for signature to Mr. Lambert which purported to settle the dispute.

(R. 306) The documents stated, in part:

IN CONSIDERATION of the mutual dismissal of the Complaint of John Deere Company (hereinafter the "Plaintiff") and the Counterclaim of A & H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson (hereinafter the "Defendants") Plaintiff and Defendants hereby release and forever discharge the other from any and all claims, demands, damages, actions, causes of action or suits of whatever kind or nature, which now exist or which may hereafter accrue, because of, arising out of, or in any way connected with that contractual dispute, the details of which are more fully set forth in the files and records of the District Court of Utah County, in that certain action entitled John Deere Company, plaintiff v. A & H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson, defendants, Civil No. CV-89-1151, pending in the Fourth Judicial District Court of Utah County, State of Utah .

. . . .

(R. 306) The language of this proposed agreement was not the comprehensive and general release which Mr. Lambert had anticipated when he proposed the settlement. (R. 332) Nevertheless, Mr. Lambert forwarded the proposed agreement to defendants, who advised him of their rejection of the agreement because it did not expressly include the John Deere Farm Plan judgment, and refused to sign the agreement. (R. 332) Mr. Lambert was not aware of the John Deere Farm Plan judgment until this time. (R. 333)

On July 18, 1991, plaintiff's counsel wrote to Mr. Lambert, inquiring why defendants had not executed the documents. (R. 300) Mr. Lambert responded by requesting that the documents include the John Deere Farm Plan obligation in a letter dated July 29, 1991.

(R. 298) His letter stated:

My client is concerned about making sure that the Mutual Release of All Claims comprehensively releases him from any obligations to John Deere. Specifically, my client would like to add John Deere Farm Plan as a releasing party. Please let me know if that is acceptable so that we can get this matter finalized.

(R. 298) Shortly thereafter, Kim Wilson telephoned Mr. Lambert and told him that plaintiff would not agree that the general release of claims should include the Farm Plan obligation. (R. 332)

At no time did defendants sign plaintiff's proposed settlement agreement, nor was the agreement ever filed with the clerk of the court.

On October 22, 1991, plaintiff brought a motion to enforce its proposed settlement agreement. (R. 293-94) Defendants responded by filing a cross-motion to enforce their proposed settlement agreement, and requested oral argument. (R. 329-30, 336)

On August 28, 1992, oral arguments were heard on the pending motions. (R. 361) In its memorandum decision, the court entered an order granting plaintiff's motion to enforce the settlement agreement, denying defendants' motion, and requiring defendants to execute plaintiff's proposed settlement documents. (R. 368-69) The court entered an order formalizing this decision on September 21, 1992. (R. 371) Defendants' appeal of this order followed.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED IN ENFORCING THE PROPOSED SETTLEMENT AGREEMENT WHEN ITS SPECIFIC TERMS WERE NEVER PROPOSED NOR AGREED TO BY DEFENDANTS.

A judgment entered to end litigation by consent of the parties is in the nature of a contract, and the court's authority to

approve such an agreement depends upon its validity. To be valid, such an agreement must have (1) the proper subject matter, (2) competent parties, (3) the assent or meeting of the minds of the parties, and (4) consideration. In the present case, there was no assent or meeting of the minds of the parties.

For a meeting of the minds to occur, the agreement must embody a distinct understanding common to both parties, and acceptance must be unconditional and identical to the offer. In the present case, the trial court erred in finding that the parties assented to plaintiff's proposed agreement because the evidence on the record shows that defendant's initial offer was all-inclusive; was based upon all of the issues raised in the complaint and counter claim, and did not specify any limitations; plaintiff's proposed agreement, rather than being an unconditional acceptance of plaintiff's offer, was a counter-offer because it proposed terms that were materially different and more limited than defendants contemplated; and defendants clearly rejected it. Because no meeting of the minds occurred, but an offer and a counter-offer were made, none of which were accepted, no enforceable agreement came into being and the trial court erred in summarily enforcing it.

Further, although counsel may bind a client in procedural matters arising during the course of the action, only the client has the authority to settle the action. Accordingly, to the extent that Mr. Lambert's letter of April 10, 1991 purported to settle

only the issues raised in plaintiff's complaint, not inclusive of the John Deere Farm Plan judgment, Mr. Lambert did not have the apparent or implied authority of defendants to do so, making the agreement invalid.

II. THE TRIAL COURT ERRED IN ENFORCING THE SETTLEMENT AGREEMENT WHEN THE AGREEMENT HAD NOT BEEN PREVIOUSLY FILED WITH THE COURT OR ENTERED UPON THE MINUTES OF THE COURT.

Utah Code Ann. § 78-51-32(2) (1992), Rule 4-504(8) of the Code of Judicial Administration, and Utah case law interpreting these statutes indicate that enforcement of settlement agreements that are not made before a court or are written, signed by the parties, and filed with the clerk of the court, may be found to be valid only if there are clear indicia on the record that an agreement was actually made. Absent such indicia, a court may not enforce a purported settlement agreement. In the present case, the purported settlement agreement was not made before the court nor written, signed by the parties, and filed with the clerk of the court. Further, the record indicates that the parties never actually made an agreement because they never agreed upon its specific terms. Accordingly, the purported settlement agreement is unenforceable under the intent of these statutes.

III. IF THE SETTLEMENT AGREEMENT IS ENFORCEABLE, IT WAS ENTERED INTO BY MISTAKE AND SHOULD BE RESCINDED.

Should this court find that the parties actually entered into an enforceable settlement agreement, it should also find that the agreement is subject to rescission because of Mr. Lambert's unilateral mistake of fact. The record shows that a unilateral

mistake of fact occurred because Mr. Lambert was unaware of the existence of the John Deere Farm Plan judgment until after the settlement negotiations had begun and defendants had rejected the terms of plaintiffs' proposed settlement documents. Because he was not specifically aware of the judgment, he did not specify it in his settlement offer, even though the language he used was inclusive enough to include it. Rescission should be granted for this mistake because: (1) It deprives defendants of their right and ability to prosecute their counterclaim without giving them the benefit they bargained for in making the settlement offer; (2) inclusion of a release of the John Deere Farm Plan judgment was material to defendants' willingness to settle the case; (3) although Mr. Lambert made reasonable inquiry regarding the facts, defendants and plaintiff's counsel did not specifically inform him of the existence of the John Deere Farm Plan judgment until after negotiations had commenced; and (4) rescission will not prejudice plaintiff because it will simply be restored to the position of having to prosecute its complaint.

IV. IF AN AGREEMENT EXISTED, ITS TERMS WERE AMBIGUOUS AND THE TRIAL COURT ERRED IN SUMMARILY ENFORCING IT.

The ambiguity of the language in the letter of April 10, 1991, which proposed a general release of claims, was the subject of oral argument in the trial court. The trial court erred in interpreting this letter by: (1) finding there was a meeting of the minds, and (2) finding the letter to be clear and unambiguous. The determination of the existence of ambiguity is a question of law,

but the interpretation of an ambiguous contract is a question of fact. The court stated that it found no ambiguity, but yet, in making its ruling, it stated that it considered the "posture of the parties" and the factual background. The court ruled, however, without conducting an evidentiary hearing on the factual background, and summarily enforced the agreement by motion. The trial court committed reversible error by finding the letter to be unambiguous when it is clear that essential terms were missing and the letter contemplated a detailed general release agreement, and in making an essentially factual finding without the benefit of taking evidence.

ARGUMENT

I. THE TRIAL COURT ERRED IN ENFORCING THE PROPOSED SETTLEMENT AGREEMENT WHEN ITS SPECIFIC TERMS WERE NEVER PROPOSED NOR AGREED TO BY DEFENDANTS.

A judgment entered by the consent of the parties to litigation is "in the nature of a contract approved or adopted by the court," and the court's authority to approve such an agreement depends upon the validity of the agreement. Financial Indemnity Co. v. Bevans, 38 Or. App. 369, 590 P.2d 276, 277-78 (1979). In Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (1980), the Utah Supreme Court set out the elements essential to the validity of such an agreement: "(1) a proper subject matter; (2) competent parties; (3) an assent or meeting of the minds of the parties; and (4) a consideration given for the accord."

In the present case, the core issue is whether the third element, the existence of an assent or the meeting of the minds of the parties, has been shown. The record and the relevant law indicate that it has not, thereby making the trial court's enforcement of the settlement agreement at issue improper.

A. There Was No Meeting Of The Minds On The Terms Of The Attempted Settlement Agreement.

For a settlement, which is an agreement to end judicial proceedings, to be binding and enforceable, there must be a meeting of the minds as to its terms and conditions. Recreational Development Co. of America v. American Construction Co., 749 P.2d 1002, 1005 (Colo. Ct. App. 1987). Thus, the same principles which apply to contract law apply to determining the validity of a settlement agreement:

Under basic contract law principles, a contract is not formed without a meeting of the minds." "[C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." Determining whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into.

Crismon v. Western Co. of North America, 742 P.2d 1219, 1221-22 (Utah Ct. App. 1987) (citations omitted) (quoting Oberhansley v. Earle, 572 P.2d 1384, 1386 (Utah 1977) and Cessna Fin. Corp. v. Meyer, 575 P.2d 1048, 1050 (Utah 1978)); accord John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205, 1207 (Utah 1987).

For a meeting of the minds to occur, the contract must embody "a distinct understanding common to both parties." Gulf Chemical Employees Federal Credit Union v. Williams, 107 Idaho 890, 693 P.2d 1092, 1095 (1984). Further, "[t]he contract must be specific enough to show that the parties shared a mutual intent." Id. "If contracting parties ascribe different meanings to a material contract term which is ambiguous, there has been no meeting of the minds and no valid contract exists." Real Equity Diversification, Inc. v. Coville, 744 P.2d 756, 758 (Colo. Ct. App. 1987).

Further, "[i]t is a basic principle of contract law that, in order to create a contract, an acceptance must be unconditional, identical to the offer, and must not modify, delete or introduce any new terms into the offer." Gyurkey v. Babler, 103 Idaho 663, 651 P.2d 928, 931 (1982). A purported acceptance which adds a qualification or requires performance of conditions is not an acceptance. Parry v. Walker, 657 P.2d 1000, 1002 (Colo. Ct. App. 1982) (citing Restatement (Second) of Contracts, § 60). In other words, if a party proposes a material alteration of the contractual terms, "the modified offer becomes a counter offer that must be accepted unconditionally by the original offeror to create a contract." Anderson Excavating and Wrecking Co. v. Certified Welding Corp., 769 P.2d 887, 889 (Wyo. 1988). "A purported acceptance that changes the terms of an offer in any material respect may operate as a counteroffer, but it is not an acceptance and does not consummate the contract." Northwest Television Club,

Inc. v. Gross Seattle, Inc., 26 Wash. App. 11, 612 P.d 422, 426 (1980).

In its minute entry following oral arguments on the summary enforcement of the purported settlement agreement, the court stated,

Based on Mr. Lambert's letter and in reviewing the file, there was a general release and acceptance of each party. It appears that plts [sic] Motion to enforce the stipulation on the basis it resolved all matters with respect to this case, and there being no dispute, the motion is therefore granted.

(R. 361) During oral argument, the court stated, "there's nothing in the record to support the contention that you now assert or that your client intends to have you assert that he was thinking about this other case as well." (R. 410)

The evidence on the record which supports this conclusion, and to which the trial court referred, was Mr. Lambert's letter of April 10, 1991, which referenced this case, John Deere v. A & H Equipment, et al, and stated that "I have been asked by my client to propose a settlement with your client in the above referenced case. The settlement proposal is a mutual dismissal with prejudice and general release of claims with each party to bear their respective costs and fees." (R. 315) (Emphasis added.) Also, the record shows that the John Deere Farm Plan judgment arose from a separate action entitled Farm Plan Corp. v. A & H Equipment, Inc. and Wendell Hansen.

There is no other evidence on the record which specifically supports the trial court's conclusion, but there is substantial evidence on the record to lead one to the opposite conclusion.

The record indicates that defendants, through Mr. Lambert, intended to make a general and inclusive resolution of all issues included in the present case, including the issues raised in plaintiff's complaint and the issues raised in defendants' counterclaim. Defendants' counterclaim not only included issues raised in opposition to plaintiff's complaint but referred to to circumstances and facts and incorporated agreements underlying the Farm Plan action. Thus, some of the facts and issues underlying the John Deere Farm Plan judgment were raised in plaintiff's counterclaim, and arose out of the same nucleus of operative fact as the issues raised in plaintiff's complaint. Further, plaintiff and Farm Plan, although nominally separate corporations, were intrinsically functionally related in making business arrangements with defendant because Farm Plan is plaintiff's financing arm through which plaintiff organizes and finances its dealership arrangements with persons such as defendants, much like GMAC is to General Motors. Finally, lead counsel for plaintiffs was also counsel for Farm Plan in the Farm Plan lawsuit, and was very familiar with the issues underlying both lawsuits and the existence of the John Deere Farm Plan judgment. Plaintiff, accordingly, should have reasonably understood the general and inclusive wording of defendants' offer to include the resolution of all underlying

issues, obligations and concerns relating to defendants' franchise relationship, including the John Deere Farm Plan judgment.

Plaintiff responded to defendant's offer of settlement by a telephone call and a letter, in which no terms were discussed or defined, and by writing a settlement agreement by which it unilaterally provided terms limiting the proposed settlement agreement to a release of only those claims made in the present action. The record indicates that the parties did not propose terms that had a distinct and common understanding. Because the wording on the settlement agreement provided by plaintiffs did not correspond with the defendants' intent in making a general release, but substantially limited the scope of the release, plaintiff's proposed settlement agreement constituted a rejection of the terms offered by defendant and, accordingly, constituted a counter-offer rather than an acceptance. When informed of the terms offered by plaintiff, defendants rejected them and refused to sign the settlement agreement. Mr. Lambert, by his letter of July 29, 1991, clearly conveyed defendant's rejection of plaintiff's proposed terms and the grounds for their rejection to plaintiffs. Mr. Lambert, in this letter, attempted further negotiations as to the terms of the agreement, which were rejected by plaintiff. Accordingly, there was no meeting of the minds on the terms of the proposed settlement agreement, but only an offer and a counter-offer. No enforceable contract came into existence.

The Utah Court of Appeals considered a similar situation in Brown v. Brown, 744 P.2d 333 (Utah Ct. App. 1987), which case the trial court stated, in its verbal ruling, to be controlling of the outcome of this case, but did not follow. In Brown, the parties, a divorcing husband and wife, engaged in settlement negotiations, over a fifteen-month period, regarding the amount of child support and alimony. Mr. Brown's counsel caused Mrs. Brown's counsel to believe that the issues had been resolved and that the time which had been scheduled for the parties' depositions could be used to record a settlement agreement. The parties and their respective counsel met on the scheduled date. The proposed settlement agreement reduced the amount of alimony and increased the amount of child support due to Mrs. Brown. During the negotiations, both counsel and Mr. Brown spoke, but Mrs. Brown said nothing. After the purported agreement was reduced to writing and sent to Mrs. Brown, she rejected it, believing it to be unfair. Subsequently, Mr. Brown filed a motion for an order approving and enforcing the settlement agreement. Id. at 334. Mrs. Brown opposed this motion with an affidavit, indicating that:

[H]er former counsel had assured her that increases in alimony and child support were justified and that he was confident she would win major increases in both; that she was unaware of the tenor of the proposed settlement agreement until the day scheduled for her deposition; that her former counsel informed her that he told opposing counsel that she would agree to the settlement, that she was "shocked, dismayed, dissatisfied [sic], and confused" by her counsel's change in position; that she didn't recall speaking at the proceeding; and that she refused to sign the written agreement.

Id. The Utah Court of Appeals held that, because the agreement had not been made in court and because Mrs. Brown did not assent, at any time, to the terms of the agreement, the stipulation was not binding. Id. The Utah Court reasoned, "[b]asic to a valid stipulation is a meeting of the minds of those involved. The parties must have completed their negotiations either in person or through their attorneys acting within the rules of agency," and that because Mrs. Brown had not assented to the stipulation but remained silent, and that silence could not be construed to be assent under the circumstances, the stipulation was not binding. Id. at 335.

Brown is virtually indistinguishable from the present situation. Like Mrs. Brown, defendants did not assent to the terms of the settlement agreement proposed by plaintiff and, unlike Mrs. Brown, defendants clearly indicated their non-acceptance of the agreement. Accordingly, to be consistent with the principle of law outlined in Brown, this court should find that the parties did not enter into an enforceable agreement because defendants did not assent to the materially different terms proposed by plaintiff.

The Utah Supreme Court, in contrast, in Murray v. State, 737 P.2d 1000 (Utah 1987), affirmed the summary enforcement of a settlement agreement where where the offer had been made by the State in writing and confirmed by a telephone conversation, plaintiff's attorney informed the State that he had discussed the offer with the plaintiffs and they had accepted it, the State's

counsel forwarded a release and a check for the amount offered to the plaintiff's attorney and, thereafter, the plaintiff changed her mind and would not sign the release. The Murray court noted that "[p]laintiffs have not at any time argued that an agreement was not reached and, in fact, at oral argument, conceded such agreement. There appears to be no reason for noncompliance with the settlement other than [the plaintiff's] change of mind." Murray, 737 P.2d at 1001. This opinion underlines the pertinent rule of law: Where a meeting of the minds has occurred, a settlement agreement is enforceable; where there has not been a meeting of the minds, a settlement agreement is unenforceable.

Likewise, the Utah Court, in Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605 (Utah 1979), held that a settlement agreement was enforceable, even though not ratified by the court before enforcement was sought, because there was substantial and sufficient evidence to show that the parties had, in fact, entered into an enforceable agreement. Id. at 608. Nevertheless, the court observed that:

[I]t is apparent that the summary procedure for enforcement of unperformed settlement contracts is not a panacea for the myriad types of problems that may arise. The summary procedure is admirably suited to situations where, for example, a binding settlement bargain is conceded or shown, and the excuse for nonperformance is comparatively unsubstantial. On the other hand, it is ill suited to situations presenting complex factual issues related either to the formation or the consummation of the contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve.

Id at 607 (quoting Autera v. Robinson, 136 U.S. App. D. C. 216, 419 F.2d 1197, 1200 (1969)).

The present situation is distinguishable from both Murray and Tracy Collins Bank & Trust because, in both cases, there was no question that an agreement had been reached, while the predominant dispute in this case is whether an agreement ever came into being.

The Utah Court of Appeals, in Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 480 (Utah Ct. App. 1989), affirmed the summary enforcement of a settlement agreement where the defendants did not clearly express their intention not to settle the dispute on the proposed terms. The court stated that the defendants "would have been in a position to defeat summary enforcement of the settlement through an affidavit identifying the specific statements and actions they had taken to communicate to Zions their decision not to accept the settlement offer at that time," if they had clearly expressed their intention during the settlement conference. Id. Barbara Jensen Interiors does not represent an applicable precedent for resolution of the present case because defendants, through Mr. Lambert, not only clearly communicated their rejection of the terms proposed by plaintiff in his letter of July 29, 1991, but Mr. Lambert provided an affidavit to this effect to the trial court.

Other jurisdictions have upheld the same principle of law. For example, the Wyoming Court found that there was no meeting of the minds and, therefore, no contract, where the plaintiff sent a

lease agreement to the defendant, who reviewed it and called plaintiff to discuss the terms, and then altered the document to reflect the negotiated changes, initialled the changes, signed the document, and returned it to the plaintiff. Anderson Excavating and Wrecking Co., 769 P.2d at 889. Similarly, the New Mexico Court overturned an order of dismissal that rested upon a release, in which counsel for one party drew up a stipulation for dismissal and submitted it to counsel for the other party, who added a significant additional term to agreement which counsel for the first party rejected. Fratello v. Socorro Electric Cooperative, 107 N.M. 378, 758 P.2d 792, 795 (N.M. 1988). The Fratello court reasoned that there was no unconditional acceptance of the offer of settlement because of the addition of the significant additional term to the offer. Id.; accord Financial Indemnity Co., 590 P.2d at 278. Likewise, the Colorado Supreme Court, in H.W. Houston Construction Co. v. District Court, 632 P.2d 563 (Colo. 1981), found that a settlement agreement was not reached under the following circumstances: The corporate plaintiff, whose truck had been damaged and whose driver had been severely injured in an accident caused by defendant, stipulated the amount of property damage to plaintiffs during a pre-trial conference. Some time later, the parties' attorneys reached a compromise and settlement agreement. The defendants each tendered a check to the plaintiff in the aggregate amount of the stipulated property damage, along with a stipulation of dismissal with prejudice and a general

release from all liability. The plaintiff's attorney refused to execute the stipulations and informed his client that he would not allow it to accept the settlement because he had understood the settlement agreement to be for the amount of property damage only and not for the injuries to the driver. The plaintiff's attorney offered to accept the tendered checks in full settlement of the plaintiff's claim for property damage or to return the checks and go to trial on both issues. The defendants rejected plaintiff's offers, preferring instead to attempt to enforce the alleged agreement. Id. at 564-65. The court found that "the parties in this case never reached an understanding which could be the basis of a binding compromise and settlement," and, therefore, there was no enforceable contract. Id. at 565.

The present case is similar to these cases because the parties never achieved a meeting of the minds on material issues. The record indicates only a series of offers, counter-offers, and negotiations, with no agreement on specific terms. Accordingly, this Court should find that no enforceable contract exists or ever did, and the trial court erred so finding and summarily enforcing the settlement offer proposed by the plaintiff.

B. Mr. Lambert Did Not Have Authority To Settle The Lawsuit On Terms Different Than Those Agreed To By Defendants.

Mr. Lambert, counsel for defendants, did not have the authority to settle the lawsuit on terms different than those agreed to by defendants. It is a well-settled rule of law that an "attorney is authorized by virtue of his employment to bind the

client in procedural matters arising during the course of the action," but is not authorized, "merely by virtue of his retention in litigation, to 'impair the client's substantial rights or the causes of action itself.'" Blanton v. Womancare Inc., 38 Cal. 3d 396, 696 P.2d 645, 650, 212 Cal. Rptr. 151 (1985) (quoting Linsk v. Linsk, 70 Cal. 2d 272, 449 P.2d 760, 74 Cal. Rptr 544 (1969)). Thus, "an attorney ordinarily has no apparent authority to settle his client's action without the client's consent." Miotk v. Rudy, 227 Kan. 296, 605 P.2d 587, 591 (1980). With respect to this issue, the Kansas court approved the following language from Reimer v. Davis, 224 Kan. 25, 580 P.2d 81, 85 (1978):

We have previously considered the nature and extent of an attorney's authority in handling a client's case. It has been recognized generally that a client is bound by the appearance, admissions, and actions of counsel acting on behalf of his client. The rule is limited, however, to control over procedural matters incident to litigation. The client has control over the subject matter of litigation. An attorney has no authority to compromise or settle his client's claim without his client's approval.

Miotk, 605 P.2d at 590 (citations omitted). Accordingly, for an attorney to bind a client to a settlement agreement, "he must have specific authority to do so, unless there is an emergency or some overriding reason for enforcing the settlement despite the attorney's lack of specific authority." Bolles v. Smith, 92 N.M. 524, 591 P.2d 278, 280 (1979). An attorney's authority is not enlarged simply because the contract is entered into in conjunction with pending litigation. Blanton, 696 P.2d at 652.

In the present case, the agreement at issue is not procedural; it relates to the dismissal of both parties' claims against the other. Thus, the parties, themselves, must approve the terms of any agreement; absent the parties' express approval of the terms, counsel for the parties do not have authority to enter into the agreement. Defendants only authorized Mr. Lambert to settle the entire claim, not the limited issues to which plaintiff wished to restrict the settlement agreement. Defendants did not authorize Mr. Lambert to enter into an agreement settling less than all of the issues involved, including issues relating to the Farm Plan action which they raised in their counterclaim. Accordingly, to the extent that Mr. Lambert's letter of April 10, 1991 purported to propose settlement terms limiting the settlement to only those issues and obligations raised in plaintiff's complaint, Mr. Lambert did not have actual or apparent authority to accept plaintiff's settlement terms and acted rightly in refusing to do so.

II. THE TRIAL COURT ERRED IN ENFORCING THE SETTLEMENT AGREEMENT WHEN THE AGREEMENT HAD NOT BEEN PREVIOUSLY FILED WITH THE COURT OR ENTERED UPON THE MINUTES OF THE COURT.

Utah Code Ann. § 78-51-32 (1992), provides, in relevant part:

An attorney and counselor has authority:

. . . .

(2) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk and entered upon the minutes of the court, and not otherwise.

This language is echoed by Rule 4-504(8) of the Code of Judicial Administration, which states:

No orders, judgments or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

Judge Davidson, in his concurrence to Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 481 (Utah Ct. App. 1989), states that Rule 4-504(8) was "formerly a rule of practice in the courts and was therefore not afforded the full enforcement of a rule of civil procedure," but that because it "has now been elevated into the Code of Judicial Administration, it is now entitled to enforcement equal to that given other rules."

The language of these rules indicates that, for a stipulation to be binding on the parties, it should be written, signed, and filed with the clerk, or entered into in court. This rule is somewhat flexible in the case of settlement stipulations because of the limiting language contained in Rule 4-504(10) of the Rules of Judicial Administration, which states that "[n]othing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing"; however, that flexibility does not extend to a situation where it is clear that a written agreement was contemplated by the parties.

The Utah Courts have interpreted the intent of these rules to allow enforcement of oral settlement agreements, provided that there are clear indicia on the record that an agreement was actually made. Absent a clear finding that the parties actually

entered into a valid settlement agreement, such a stipulation would have to have been entered into before the court or be in writing, signed by the parties and/or their counsel, and be filed with the clerk of the court to be binding.

Judge Bench, in his concurring and dissenting opinion to Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478 (Utah Ct. App. 1989), succinctly set forth this rule:

In Brown v. Brown, 744 P.2d 333 (Utah Ct. App. 1987), this court applied the predecessor to rule 4-504(8) and expressly held that settlement agreements must be in the form of a written stipulation to be enforceable. I believe Brown is indistinguishable from the instant case.

The only exception to the rule that settlement agreements must be in writing is where the parties concede the existence of an agreement. Throughout the instant case, the Jensens have consistently denied that an agreement was ever reached.

In view of the clear language of rule 4-504(8) and our decision in Brown, I would reverse the order compelling settlement and remand the case for trial.

Id. at 481-82 (citations omitted).

As discussed above, the court in Brown v. Brown, 744 P.2d 333, 335 (Utah Ct. App. 1987), held that, because the Browns' agreement had not been made in court and because Mrs. Brown did not assent, at any time, to the terms of the agreement, the stipulation the parties entered into to settle child support and alimony issues was not binding. Id. at 335. The Brown court stated:

For a stipulation to be binding, agreement by the parties must be evidenced by a signed writing which would satisfy the Statute of Frauds, or the agreement must be stated in court on the record before a judge. The facts in this case do not show such evidence. Therefore, there was no

stipulation reached between the parties and there is nothing for the court to enforce.

Brown, 744 P.2d at 335.

This rule is directly applicable to the present case. In the present case, the alleged settlement agreement was not entered into before the court and is not on the record; and has not been evidenced by a writing, signed by the parties or their counsel, and filed with the clerk of the court. Thus, for this agreement to be binding, there must be substantial evidence that an agreement was actually reached. The record indicates that no agreement was actually reached, making the present situation virtually indistinguishable from that in Brown, and the reasoning outlined by Judge Bench in Barbara Jensen Interiors applicable.

In conclusion, § 78-51-32(2) and Rule 4-504(8), and the case law interpreting these statutes, compel the conclusion that the proposed settlement agreement is unenforceable. Accordingly, this Court should find that the trial court erred in summarily enforcing the proposed settlement agreement.

III. IF THE AGREEMENT WAS ENFORCEABLE, IT WAS ENTERED INTO BY MISTAKE AND SHOULD BE FOUND TO BE VOID.

In the event that this court should find the settlement agreement at issue to be enforceable, the trial court's ruling that it is a valid settlement agreement should still be reversed because it was entered into as the result of a unilateral mistake.

In B & A Assocs. v. L.A. Young Sons Constr. Co., 796 P.2d 692 (Utah 1990), the Utah Supreme Court delineated the elements of

mutual mistake of fact sufficient to make an otherwise valid contract unenforceable, as follows:

1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.

2. The matter as to which the mistake was made must relate to a material feature of the contract.

3. Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.

4. It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of the bargain. In other words, it must be possible to put him in status quo.

Id. at 695 (quoting John Call Engineering, 743 P.2d at 1209-10)).

Although defendants knew about this judgment and clearly intended to settle not only the issues raised in plaintiff's complaint but also the John Deere Farm Plan judgment, their counsel, Mr. Lambert, was not involved in the Farm Plan case and was unaware of the existence of the John Deere Farm Plan judgment until after the settlement negotiations culminating in the purported settlement agreement had been initiated. In contrast, plaintiff and Farm Plan, the affiliated financing arm of plaintiff through whose instrumentality plaintiff established farm equipment dealerships, were well aware of the judgment based upon Farm Plan's claims, and the underlying circumstances for the issues defendants addressed in their counterclaim. Not only was plaintiff aware of the Farm Plan judgment, plaintiff's counsel, Kim Wilson, was also aware of the judgment, having also served as counsel on the Farm

Plan case. Thus, even though defendant's counsel was unaware of the judgment, plaintiff was aware, making it a unilateral mistake. As a consequence, Mr. Lambert did not explicitly know about the judgment in the Farm Plan case on April 10, 1991, so was not able to specify, in his letter of April 10, 1991, that defendants' settlement offer included and was conditioned upon the release of all claims between these parties.

The facts of the present case satisfy the elements set forth in B & A Assocs.

First, the mistake is so grave as to make the contract, as made, unconscionable. If this settlement agreement is enforced, defendants will have lost the right to litigate the claims set forth in their counterclaim and will also have lost the benefit of the bargain which they intended to make, namely, to dismiss their obligation on the John Deere Farm Plan judgment. This is serious enough to render the enforcement of the bargain unconscionable because defendants will have given up something of value, their right to pursue their counterclaim without receiving the benefit of the bargain they were willing to make.

Second, the matter relates to a material feature of the contract. Defendants' counterclaims were related, in part, to the circumstances underlying the judgment and, in part, to the circumstances underlying the complaint. Absent dismissal of all the issues related to this litigation, including the judgment, defendants would not have been willing to dismiss their

counterclaim, making the mistake of fact highly material to the agreement.

Third, the mistake occurred despite Mr. Lambert's ordinary diligence. Because Mr. Lambert had not been involved in the John Deere Farm Plan judgment, he was not aware of it and would not have been aware of it in the course of pursuing the present action.

Finally, it is possible to give relief to defendants without unduly prejudicing plaintiff. If the settlement agreement is found to be unenforceable, the only result is that plaintiffs will have to litigate their lawsuit. It is universally held that a party is not prejudiced by being forced to litigate its own lawsuit. Rescission of the purported settlement agreement will serve to simply place the parties in status quo, in the exact position they would have been in absent the purported settlement agreement.

The Utah Supreme Court has also held that "[w]hen one party's mistake of fact is coupled with knowledge of the mistake by the other party or a mistake is produced by fraud or other inequitable conduct by the nonerring party, the mistake provides a basis for reformation or rescission." B & A Assocs., 796 P.2d at 696. Indeed, reformation or rescission may be available "where, unknown to one of the parties, an instrument contains a mistake rendering it at variance with the prior understanding and agreement of the parties, and the other party learns of the mistake at the time of the execution of the instrument and later seeks to take advantage

of it." Id. (quoting Spirt v. Albert, 109 Conn. 292, 146 A. 717, 720 (1929)).

This principle of law is applicable to the present case. Plaintiff was well aware of the existence of the Farm Plan judgment, the underlying facts, and the fact that defendants probably intended to include this judgment in the settlement agreement. Mr. Lambert did not know about it. Plaintiff now seeks, because Mr. Lambert did not specifically identify this judgment in the language of his letter, to take advantage of this situation and to maintain that defendants did not mean to include it in the agreement. In the words of Fogdall v. Lewis & Clark College, 38 Or. App. 541, 590 P.2d 775, 779 (1979) (quoting Klimek v. Perisch, 231 Or. 71, 371 P.2d 956, 958 (1962)), "[n]either party to a contract may assume that a contract exists if he knows that the other party does not intend what his words or actions may seem to express.'" Accordingly, defendants should not be bound by the contract that plaintiff sought to make, in light of plaintiff's knowledge of the underlying factual situation and Mr. Lambert's mistake of fact.

IV. IF AN AGREEMENT EXISTED, ITS TERMS WERE AMBIGUOUS AND THE TRIAL COURT ERRED IN SUMMARILY ENFORCING IT.

The clarity or ambiguity of the language in the letter of April 10, 1991, which proposed a "general release of claims" was the subject of oral argument in the trial court below. The trial court's ruled verbally from the bench, stating:

And based on the letter, your letter, and in view of the pleadings in this case, which I have reviewed, and the posture of these parties, it appears evident to the Court that the only thing that reasonably could have been contemplated is that it involved a general release of claims of each party with respect to the matter that is pending before the Court in this action.

(R. 412)

The trial court erred in its interpretation of the letter which proposed a settlement with plaintiff. First, the court erred in finding that there was a meeting of the minds, which issue has been fully discussed in Point I above. Second, the court erred, as a matter of law, in its interpretation of the letter. If the language of the April 10, 1991 letter was clear and unambiguous, the court need not have considered the "posture of these parties" in order to interpret it. Once the court began to consider the "posture of these parties," it was incumbent upon the court to conduct an evidentiary hearing on the factual background rather than summarily enforce the agreement by motion. The letter of April 10, 1991, stated, "I have been asked by my client to propose a settlement with your client in the above-referenced case. The settlement proposal is a mutual dismissal with prejudice and a general release of claims with each party to bear their respective costs and fees." (R. 315)

The letter contemplates two separate acts of legal significance: The dismissal of the case and, conjunctively, an agreement for the release of all claims between these parties. It is also clear that two separate documents were to be prepared to

set forth a stipulation for dismissal of the pending action and to memorialize the "general release of claims" which were outstanding between the parties. It is customary in such releases that the claims being released will be described in excruciating detail. Such documents as prepared by plaintiff's counsel, contained terms therein or omitted terms therefrom which were material to the defendants and made the proposed documents unacceptable to defendants.

As a general rule in the Utah courts, "[l]anguage in a written document is ambiguous if the words may be understood to support two or more plausible meanings. A court is justified in determining that a contract or order is ambiguous if its terms are either unclear or missing." Whitehouse v. Whitehouse, 790 P.2d 57, 60 (Utah Ct. App. 1990) (emphasis added) (citations omitted). The determination of whether an ambiguity exists in contractual language is a legal determination for the court and, on appeal, is not entitled to deference. Id. Similarly, in the absence of ambiguity, construction of a written document is a question of law not entitled to deference by the appellate court. Terry v. Price Municipal Corp., 784 P.2d 146, 149 (Utah 1989).

In the present case, because it is clear that further documentation of the agreement was required and was, in fact, prepared, the agreement, if any, was, by definition, ambiguous because material terms were missing. Plaintiff has argued that the language of the letter restricts the offer to a settlement of only

those issues and obligations raised in its complaint. Defendants argue, in contrast, that the wording of the offer is sufficiently general as to contemplate a global release of claims. The record also indicates that there was no distinct or definite understanding reached by the parties as to the exact meaning of the language. Because this language, therefore, is subject to at least two plausible meanings, it is ambiguous. Accordingly, parol evidence as to the partial intent should have been taken by the trial court in seeking to interpret this language.

These parties had a lengthy history of dealings with numerous contracts directly with John Deere and with John Deere affiliates. Construction of an agreement in such a case is a question of fact and parol evidence may be used in arriving at an interpretation. Redevelopment Agency of Salt Lake City v. Daskalas, 785 P.2d 1112, 1118 (Utah Ct. App. 1989). This court has noted that:

[I]t is a fundamental rule that in the construction of contracts the courts may look not only to the language employed but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. To ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view.

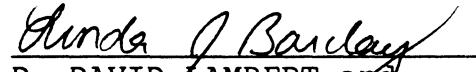
In the present case, the trial court made no findings. The court took no evidence other than to consider the affidavit submitted by defendants' counsel. The trial court did not resolve this essentially factual issue by receiving evidence, but summarily decided the issue based only upon the memoranda and oral arguments

of the respective counsel. The trial court's action in failing to take evidence on an issue of fact is reversible error. This court, therefore, should reverse the trial court's summary enforcement of the proposed settlement agreement and remand for trial.

CONCLUSION

Defendants respectfully request that this Court find that the trial court erred in summarily enforcing plaintiff's proposed settlement order, reverse the trial court's judgment, and remand the case to the trial court for trial.

DATED this 19th day of January 1993.



D. DAVID LAMBERT and
LINDA J. BARCLAY for
HOWARD, LEWIS & PETERSEN

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 19th day of January, 1993.

R. Brent Stephens
Ryan E. Tibbits
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145

Glenn J. Barclay
ATTORNEY

FILED
Fourth Judicial District Court of
Utah County, State of Utah.
28-2-92
CARMA B. SMITH, Clerk
3 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JOHN DEERE COMPANY,

Plaintiff,

vs.

A & H EQUIPMENT, INC. et al

Defendant.

CASE NUMBER: CV 89 1151

DATE: August 28, 1992

CULLEN Y. CHRISTENSEN, JUDGE

Rept: Vonda Bassett, CSR

ORAL ARGUMENTS

This was the time set for hearing oral arguments on pending motions. R. Brent Stephens appeared as counsel for the plaintiff and D. David Lambert as counsel for the defendant.

Mr. Stephens addressed the Court and argued the Motion to enforce Settlement Agreement.

Mr. Lambert responded. Background of the case reviewed for the Court.

Mr. Stephen argued on rebuttal. Matter submitted.

The Court, in looking at the Brown Case, is bound by the majority ruling. Matter discussed.

Based on Mr. Lambert's letter and in reviewing the file, there was a general release and acceptance of each party. It appears that plts Motion to enforce the stipulation on the basis it resolved all matters with respect to this case, and there being no dispute, the motion is therefore granted.

Mr. Stephens to prepare the Order, submit to Mr. Lambert to approve as to form and file same with the Court for signing and filing.

Fourth Judicial District Court
of Utah County, State of Utah
9-21-92
CARMA B. SMITH, Clerk

 Deputy

R. BRENT STEPHENS (A3098)
KIM R. WILSON (A3512)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JOHN DEERE COMPANY,

Plaintiff,

O R D E R

vs.

A & H EQUIPMENT, INC., WENDELL
HANSEN, MARK B. ANDERSON, and
VADA A. ANDERSON,

Civil No. CV-89-1151
Judge Cullen Y. Christensen

Defendants.

Plaintiff's Motion to Enforce Settlement Agreement and
defendants' cross-motion to enforce settlement agreement came on
regularly for hearing before the Honorable Cullen Y. Christensen
on August 28, 1992, at 3:00 p.m. Plaintiff was represented by
its counsel R. Brent Stephens of the law firm of Snow,
Christensen & Martineau, and defendants were represented by their
counsel D. David Lambert of the law firm of Howard, Lewis &
Petersen.

The Court reviewed the submissions and memoranda and
affidavit submitted by the parties, and the Court heard oral

argument. After being fully apprised, the Court hereby orders the following:

1. Plaintiff's Motion to Enforce Settlement Agreement is hereby granted.

2. Defendants' Motion to Enforce Settlement Agreement is hereby denied.

3. This action is settled upon the following terms and conditions:

a. A Stipulation, Motion and Judgment of Dismissal with prejudice as to the Complaint and Counterclaim will be signed by counsel and presented to the Court in the form attached hereto as Exhibit "A."

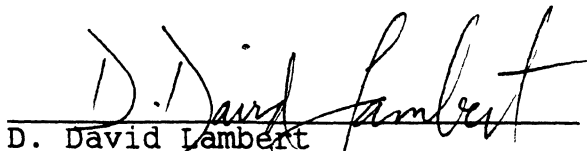
b. The Mutual Release of All Claims attached hereto as Exhibit "B" is hereby declared in full force and effect as though executed by all of the defendants.

DATED this 21 day of September, 1992.

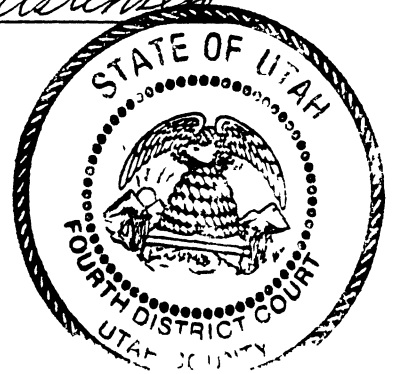
BY THE COURT :


CULLEN Y. CHRISTENSEN
District Court Judge

APPROVED AS TO FORM:


D. David Lambert

21\RBS\12976.004\Settlement.Ord



FILED
Fourth Judicial District Court
of Utah County, State of Utah
9-21-92
CARMA B. SMITH, Clerk

R. BRENT STEPHENS (A3098)
KIM R. WILSON (A3512)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

MS Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JOHN DEERE COMPANY,

Plaintiff,

JUDGMENT OF DISMISSAL

vs.

A & H EQUIPMENT, INC., WENDELL
HANSEN, MARK B. ANDERSON, and
VADA A. ANDERSON,

Civil No. CV-89-1151
Judge Cullen Y. Christensen

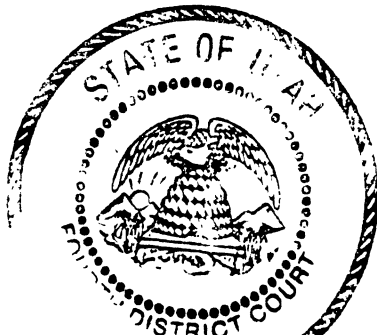
Defendants.

Based upon the Stipulation and Motion of the parties, and
good cause appearing therefor, it is hereby

ORDERED that plaintiff's Complaint and defendants'
Counterclaim be and hereby are dismissed with prejudice, and upon
the merits, with each party to bear their own costs and
attorneys' fees.

DATED this 21 day of September, 1992.

BY THE COURT :



Cullen Y. Christensen
CULLEN Y. CHRISTENSEN
District Court Judge

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Cynthia Northstrom, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for plaintiff herein; that she served the attached **proposed JUDGMENT OF DISMISSAL** (Case Number CV-89-1151, Fourth Judicial District Court in and for Utah County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

D. David Lambert, Esq.
Howard, Lewis & Petersen
Post Office Box 778
Provo, Utah 84603

and causing the same to be mailed first class, postage prepaid, on the 14th day of September, 1992.

Cynthia Northstrom
Cynthia Northstrom

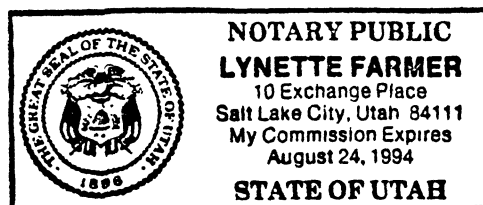
SUBSCRIBED AND SWORN to before me this 14th day of September, 1992.

Lynette Farmer

NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

8-24-94



HOWARD, LEWIS & PETERSEN

ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street

Post Office Box 778

Provo, Utah 84603

Jackson Howard

S. Rex Lewis

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Linda J. Barclay

Area Code 801

Telephone 373-6345

Telefax 377-4991

P:A&HEQUIP.DDL

Our File No. 19,456

April 10, 1991

R. Brent Stephens, Esq.
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Re: John Deere v. A & H Equipment, et al.

Dear Brent:

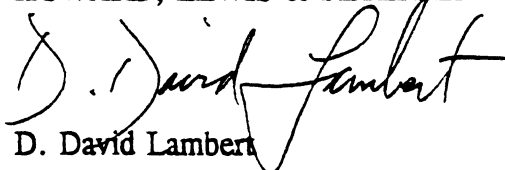
I have been asked by my client to propose a settlement with your client in the above referenced case. The settlement proposal is a mutual dismissal with prejudice and general release of claims with each party to bear their respective costs and fees.

As you may know, the defendants have been involved in other litigation and have generally suffered serious financial reversals. I have evaluated the position of my clients and I believe that they have everything to gain by going forward with the litigation on the counterclaim and little or nothing to lose because they could not respond to a judgment if you were to obtain one.

If this proposal is unacceptable, I need to immediately schedule a time to review your document production and dates for depositions. If I do not have your response by April 22, 1991, I will proceed with discovery scheduling.

Respectfully,

HOWARD, LEWIS & PETERSEN



D. David Lambert

cc: A & H Equipment

MUTUAL RELEASE OF ALL CLAIMS

IN CONSIDERATION of the mutual dismissal of the Complaint of John Deere Company (hereinafter the "Plaintiff") and the Counterclaim of A & H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson (hereinafter the "Defendants") Plaintiff and Defendants hereby release and forever discharge the other from any and all claims, demands, damages, actions, causes of action or suits of whatever kind or nature, which now exist of which may hereafter accrue, because of, for, arising out of or in any way connected with that contractual dispute, the details of which are more fully set forth in the files and records of the District Court of Utah County, in that certain action entitled John Deere Company, plaintiff v. A & H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson, defendants, Civil No. CV-89-1151, pending in the Fourth Judicial District Court of Utah County, State of Utah.

The Settling Parties understand and agree that this is a release of all claims and includes but is not limited to contractual claims and profits, claims for damages and claims for both direct and consequential damages of any and all kind or character.

The Settling Parties understand and agree that this settlement is made for the purpose of compromising a disputed claim and shall not be construed as an admission of liability, since any liability is expressly denied.

This Release of All Claims may be executed in counterparts.

JOHN DEERE COMPANY

Dated _____

By _____
Its _____

A & H EQUIPMENT

Dated _____

By _____
Its _____

Dated _____

WENDELL HANSEN

Dated _____

MARK B. ANDERSON

Dated _____

VADA A. ANDERSON