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# La Vere Kidman et ux v. Lavine H. White et al : Brief of Appellants

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LA VERE KIDMAN, et ux,  
*Plaintiffs and Respondents,*

— vs. —

LAVINE H. WHITE, et al.,  
*Defendants and Appellant.*

KEITH S. JONES,  
*Third Party Plaintiff,*

— vs. —

WILLIAM E. WADE, et ux, et al.,  
*Third Party Defendants.*

Case  
No. 9704  
**FILED**  
JUN 17 1982  
Clerk, Supreme Court, Utah

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## BRIEF OF APPELLANTS

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Appeal From Judgments of the Third District Court  
for Salt Lake County  
HONORABLE RAY VAN COTT, JR., JUDGE

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## BRIEF OF APPELLANTS

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### STATEMENT OF THE CASE

This is an action on two contracts between William F. Wade and Erma M. Wade and Lavine H. White.

### DISPOSITION IN LOWER COURT

This case is an appeal by the defendant, Lavine H. White, of two Summary Judgments entered May 9, 1962, in Civil No. 127987 of the District Court of Salt Lake County. The first Summary Judgment was against the

defendant, Lavine H. White, in the amount of \$4,568.07, together with interest at the rate of 6% per annum from March 4, 1960, to May 1, 1962, and at 8% thereafter until paid, and attorney's fees of \$714.68. This Summary Judgment was in favor of LaVere Kidman and Leah O. Kidman. The second Summary Judgment against the defendant, Lavine H. White, was in the amount of \$550.00, together with interest at the rate of 6% per annum from March 1, 1960, to May 1, 1962, and reasonable attorney's fees in the amount of \$195.00, and reimbursement for any amounts Keith S. Jones is required to pay to LaVere Kidman as a result of this litigation. This Summary Judgment was in favor of Keith S. Jones.

## STATEMENT OF FACTS

A Conditional Sales Note was signed by Keith S. Jones on June 21, 1957, in which he promised to pay LaVere Kidman and Leah O. Kidman \$6,500.00, at \$100.00 a month, with interest at 6%. (R-4-6) This long and detailed Note contained an acceleration clause. There was also a provision for attorney's fees if suit were brought to collect the Note.

On March 31, 1959, Keith S. Jones assigned this Conditional Sales Note to William F. Wade and Erma M. Wade. (R-7-9) In the carefully prepared Assignment it was stated:

“That the assignor in consideration of the payment of \$10.00 and other good and valuable consideration . . . assigns to the assignees, all his right, title and interest in and to the aforesaid Conditional Sale Note of June 21, 1957 . . .

“3. That in consideration of the assignor executing and delivering this agreement, the assignees covenant with the assignor as follows:

“A. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignor.

“B. That the assignees will save and hold harmless the assignor of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.”

On February 4, 1961, William F. Wade and Erma M. Wade entered into an agreement with Lavine H. White, which reads as follows: (R-10) (The agreement in favor of Mr. Keith S. Jones is similar in all respects except amount. See R-19.)

“In consideration of the transfer of all right, title and interest of William E. Wade and Erma M. Wade, his wife, in and to all personal property located at 3325 South 2300 East, Salt Lake County, Utah, I hereby agree to assume and pay off in full the obligation of William E. Wade and Erma M. Wade, to Woodbury Corporation (Mr. LaVere Kidman) in the amount of \$4,568.07 at the rate of \$100.00 per month. /s/ Lavine White.”

The original Conditional Sales Note came due and then delinquent, and Plaintiff to protect his interest brought this action against Jones, the Wades and White. The District Court in a pretrial hearing granted a Motion for Summary Judgment and held all defendants liable on the original Conditional Sales Note. Third Party Plain-

tiff Jones then moved in a Summary Judgment against the Wades and White. This was granted, Third Party Defendants being held liable for balance owing on Conditional Sales Note, interest due, and attorney's fees, and on agreement running in favor of Mr. Keith S. Jones.

## RELIEF SOUGHT ON APPEAL

The appellant contends that the Summary Judgment granted LaVere Kidman against Keith S. Jones, William F. Wade and Erma M. Wade, and the Summary Judgment granted Keith S. Jones against William F. Wade and Erma M. Wade was proper, but that the inclusion of Lavine H. White in the Summary Judgment was improper. Appellant asks that the two Summary Judgments be reversed, or that failing, a new trial.

## ARGUMENT

### POINT I.

THE COURT IMPROPERLY INTERPRETED A CONTRACT THAT WAS CLEAR AND UNAMBIGUOUS ON ITS FACE TO IMPOSE OBLIGATIONS NOT PRESENT IN IT.

If a contract is clear and unambiguous it should be enforced according to its obvious import. *Molyreus v. Twin Falls Canal Co.*, 54 Id. 619, 35 P. 2d 651, 94 A.L.R. 1264, and we should not labor to draw out a meaning not contained within the import of the contract.

In the case before the Court there is a contract to be construed. It is set out in the *Statement of Facts* in its

entirety', and the particular portion of the contract that is in controversy says:

“I hereby agree to assume and pay off in full the obligation of William C. Wade and Erma M. Wade, to Woodbury Corporation (Mr. LaVere Kidman) in the amount of \$4,568.07 at the rate of \$100.00 per month. /s/ Lavine H. White.” (R-10)

The trial judge interpreted this contract to mean that Lavine H. White promised to pay the remaining portion of what Keith S. Jones owed LaVere Kidman, plus any interest owed on this amount, plus attorney's fees, if any litigation was necessary to collect this amount. The Court then further interpreted this contract to include an acceleration clause. The written contract above does not contain any of these provisions, and it is submitted that the court erred in so interpreting it to contain them.

The only possible ambiguity contained in this contract is the word “obligation.” However, this term was clearly defined by the parties themselves when they spelled out the obligation, i.e. “the obligation . . . in the amount of \$4,568.07 at the rate of \$100.00 per month.” If the parties had meant anything else it would have been easy for them to have said so. Both Jones and the Wades had entered into previous agreements regarding the same property in which attorney's fees, acceleration clauses and interest were mentioned. (See R-4-9) It would seem

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<sup>1</sup> Note that all agreements concerning the agreement running in favor of LaVere Kidman also apply to the agreement running in favor of Keith S. Jones. For simplicity the first agreement is used throughout the brief to establish the argument which is applicable to both.



ridiculous for such sophisticated parties to ignore these clauses if they intended to be bound by them. If the present agreement is interpreted to contain all the elements the lower court finds it does, then no party will ever be safe in making a contract unless he carefully studies all previous contracts regarding the same subject matter made by the other party to determine if he is assuming any obligations not specifically mentioned in his particular agreement. Obviously this is a burden not intended by law to be placed on any contracting party.

## POINT II.

### THE COURT IMPROPERLY CONSIDERED PAROL EVIDENCE TO CONTRADICT THE TERMS OF A WRITTEN AGREEMENT.

The only logical way that the lower court could have reached its decision to include attorney's fees, an acceleration clause and interest in this contract was to admit parol evidence to further define the word "obligation." In the Findings of Fact the court explicitly states that defendant, Lavine H. White, assumed the Conditional Sales Note. (See R-27, 31) The court decided to admit the Conditional Sales Note between Kidman and Jones to define the "obligation" of White to the Wades to be the same as the agreement made between Kidman and Jones and the agreement between Jones and the Wades. This was improper as a matter of law, because it changed the written agreement.

Williston in *Williston On Contracts*, Revised Edition,

Section 631, aptly discusses the dangers of admitting parol evidence in this regard by quoting Pollock, C. B. in the case of *Nichol v. Godts*, 10 Exch 191, 194:

“ ‘A contract . . . must be read according to what is written by the parties, for it is a well-known principle of law, that a written contract cannot be altered by parol. If A and B make a contract in writing, evidence is not admissible to show that A meant something different from what is stated in the contract itself, and that B at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses who might be called to swear something.’ ”

In the present case there is no mere attempt to increase the obligation of White — but an attempt to contradict the actual intended obligation and to put a new one in its place. The word “obligation” once defined as \$4,568.07 at the rate of \$100.00 a month in the contract (R-10) is redefined by the court in a manner that contradicts its original meaning. Chief Justice Fuller in *Seitz v. Brewer’s Refrigerator Co.*, 141 U. S. 510, 12 S. C. 46, 30 L. Ed. 83 said:

“ . . . And when the writing itself upon its face is couched in such terms as impart a complete legal obligation without any uncertainty as to the object or extent of the engagement it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing.”

The Utah Supreme Court has repeatedly taken the same position on this subject. See *Groome v. Ogden City*

*Corp.*, 10 U. 54, 37 P. 90, 1894; *McCall Co. v. Jennings*, 26 U. 459, 73 P. 639, 1903; *McCornick v. Levy*, 37 U. 134, 106 P. 660, 1910. And it is submitted now that the obligation so clearly stated in the agreement cannot be changed by the court by using parol evidence to include some prior agreements made by other parties.

### POINT III.

IF IT IS DETERMINED THAT THE CONTRACT IS NOT CLEAR AND UNAMBIGUOUS ON ITS FACE, THEN THE COURT IMPROPERLY GRANTED A SUMMARY JUDGMENT, BECAUSE THERE WOULD THEN BE A BONA-FIDE CONFLICT ON A QUESTION OF FACT INVOLVING WHAT OBLIGATION LAVINE H. WHITE ASSUMED.

A succinct statement regarding the propriety of a Summary Judgment when there is a question of fact is found in *Moore's Federal Practice*, Section 56.15, which states:

“The function of the summary judgment is to avoid a useless trial; and a trial is not only not useless but absolutely necessary where there is a genuine issue as to any material fact. In ruling on a motion for a summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues.”

This entire case centers around the factual question of what obligation was assumed by Lavine H. White in her agreement dated February 4, 1961. The resolution of this bona-fide question of fact in a summary judgment is im-

proper and should be left to a trial. *Ulibarri v. Christensen*, 2 U 2d 367, 275 P. 2d 170, 1954.

## CONCLUSION

In conclusion, Appellant respectfully submits that the two Summary Judgments be reversed in respect to Lavine H. White in the above-entitled action but if it is decided that a genuine question of fact exists then the case should be allowed to proceed to a trial for a determination of what obligation Lavine H. White owed the respective parties.

Respectfully submitted,

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