

1963

# Paul Rubey and Carol Rubey v. Morris T. Wood and Ruby J. Wood : Brief of Appellants

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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PAUL RUBEY and  
CAROL RUBEY, his wife

Clerk, Salt Lake County Court, Utah

*Plaintiffs and Respondents*

vs.

MORRIS T. WOOD and  
RUBY J. WOOD, his wife

*Defendants and Appellants*

Case No.  
9833

Case No.  
10001

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## APPELLANTS' BRIEF

Appeal from Judgment of Third District Court  
in and for Salt Lake County, Utah  
Hon. Aldon J. Anderson

---

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Appeal from Judgment of Third District Court  
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## STATEMENT OF POINTS

1. That the court erred in not construing the agreements herein strictly against the respondents who prepared the contracts.

2. That the trial court erred in refusing the appellants' Motion to Dismiss herein on the ground that the

payments had not been made nor tendered on the contract as required by the contract nor within the 90-day grace period.

3. The District Court erred in not granting nor taking further testimony or evidence with respect to the following matters:

(a) To determine the intention of the parties as to performance of the contracts.

(b) To settle disputed questions of fact.

(c) To make a finding as to the time each annual installment was to be paid.

(d) To determine the intention of the parties with respect to title insurance and surveys.

4. That the trial court erred in refusing to allow evidence and testimony concerning the intention of the parties as to the use of the words, "or more," in the said contracts and in making a finding and decree as to the language as a matter of law.

5. That the District Court erred in refusing to permit a jury trial with respect to further hearings or evidence concerning disputed facts and intention of the parties, and this error was in violation of the Seventh Amendment of the Constitution of the United States.

6. The trial court erred in denying appellants' contention that the appellants be allowed interest at the legal rate on the contract balances.

7. That the District Court erred in dismissing Civil Case No. 139263 after it was consolidated and without the appellants being given their statutory right to amendment. That the court also erred in denying the consolidation of Civil Case Nos. 124832, 139046 and 139263.

8. That the court erred in directing the clerk of the court to make and deliver a Warranty Deed to the respondents and as set out in the Decree of November 28, 1962.

9. That it was error for the clerk to pay attorney's fees and costs of the deposit that had been made to the clerk of the court.

10. It was error for the Court to grant attorneys' fees to respondents based on the account of their attorneys.

## STATEMENT OF THE CASE

The Supreme Court of the State of Utah has previously heard and ruled on the validity of the contracts in this matter under Case No. 9447. The briefs submitted in that matter and the decision therein are respectfully referred to in explanation of the background in this matter.

No additional testimony has been taken before the District Court at Salt Lake County, State of Utah, and the rulings and judgments herein appealed from were made by the District Court as a matter of law and after hearing arguments by counsel.

The District Court has entered two different judgments herein, both of which are appealed from by this joint appeal. Said judgments directed performance of the agreements between the parties pursuant to respondents' theory of the case. First of said judgments was entered November 28, 1962, and appellants objection thereto was denied December 18, 1962. Appeal is taken from both of these rulings.

While this appeal was pending, it became apparent that there was a good possibility of a number of appeals as this contract covered a twenty-year period. Parties as a joint effort to save time and limit appeals, agreed to the appointment of a referee by the District Court. This was done, a report was rendered by the referee and the court at a later date entered a Judgment and Decree confirming and adopting the referee's report. Appeal is taken from the judgment entered and overruling of appellants' objections to said judgment.

## STATEMENT OF FACTS

The contracts herein involved were entered into between appellants and respondents on April 18, 1959 and May 11, 1959, and copies of said agreements are set out in appellants' brief in Case No. 9447 of this court.

Mr. and Mrs. Wood have had little experience in legal transactions and were inexperienced and naive in such matters (see R-105-108 original record first



appeal) while Paul Rubey has been engaged in the sale and handling of real estate in Salt Lake County for about 10 years (see R-148-153 original record).

The original and first judgment rendered by the District Court in this matter pertained merely to upholding the contract and not vitiating it for fraud as claimed. The Supreme Court of Utah sustained this judgment (see decree in Case No. 9447 filed July 20, 1962) and so while the contract was sustained, the interpretation and performance of the contracts in question had not been decided or ruled upon by the first appeal in this matter. This matter is now before the Supreme Court of Utah on the interpretation and performance under the contracts between these parties.

## ARGUMENT

1. THAT THE COURT ERRED IN NOT CONSTRUING THE AGREEMENTS HEREIN STRICTLY AGAINST THE RESPONDENTS, WHO PREPARED THE CONTRACTS.

The cardinal rule is well expressed in 12 Am. Jur. 795, Sec. 252, as follows:

“Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt be interpreted against the party who has drawn it.”

Application of this doctrine has only recently been applied by the Supreme Court of Utah in *Vera M. Stout vs. Washington Fire and Marine Insurance Co.*, decided October 11, 1963 — found at 385 Pac. 2nd 608 — the Supreme Court said:

“Any doubts or uncertainties as to the meaning or effect of the policy must be construed so as to resolve said doubts or uncertainties against the defendant who prepared the contract.”

In the current case, Rubey typed up the one contract and prepared the other in his own handwriting. His background and experience are so evidenced in the language used.

Instead of following this rule, the District Court ruled in favor of respondents in almost every instance as to these contracts.

**2. THAT THE TRIAL COURT ERRED IN REFUSING THE APPELLANTS' MOTION TO DISMISS' HEREIN ON THE GROUND THAT THE PAYMENTS HAD NOT BEEN MADE OR TENDERED ON THE CONTRACT AS REQUIRED BY THE CONTRACT NOR WITHIN THE 90-DAY GRACE PERIOD.**

Based upon the recognized rule that a contract should be construed strictly against the one who prepared it, the 90-day grace period in this agreement should be so construed and when payment was not made nor tendered in the grace period, the contract was

breached, and therefore the District Court should have so ruled. Such a ruling, of course, would negate the contract and render it unenforceable so far as the respondents are concerned because of the breach.

If payments are required to be made in installments, then failure to make payment of any installment or within any grace period, is a breach of contract. The rule is set out in American Jurisprudence, Volume 55, at page 1014: “ \* \* \* and if payment is to be made in installments, default in the payment of any installment is a distinct breach and gives the vendor the right to declare a forfeiture therefor.”

The case of Reddish vs. Smith is cited above and in that decision the court states: “The rule is laid down by 2 Warv Vend pp. 835, 836: “A neglect or refusal of either party to perform on his part will, as a rule, place him in the power of the other party, where he is not only derelict, to avoid the contract or note, at his pleasure.” See Reddish vs. Smith, 10 Wash 178, 38 Pac. 1003.

In Sherman vs. Western Construction Co., Inc., the court referred to the above case and said: “The general rule is stated in 17 C.J.S., 932, as follows: Where the covenants or promises in a contract are dependent, *only one who has performed, or tendered performance* on his part, can enforce the contract.” (See Sherman vs. Western Constructon Co., Inc., a Washington case cited at 127 Pac. 2nd 673). (Italics ours).

3. THE DISTRICT COURT ERRED IN NOT GRANTING NOR TAKING FURTHER TESTIMONY OR EVIDENCE IN THIS MATTER AND WITH RESPECT TO THE FOLLOWING MATTERS:

(a) TO DETERMINE THE INTENTION OF THE PARTIES AS TO PERFORMANCE OF THE CONTRACTS.

(b) TO SETTLE DISPUTED QUESTIONS OF FACT.

(c) TO MAKE A FINDING AS TO THE TIME EACH ANNUAL INSTALLMENT WAS TO BE PAID.

(d) TO DETERMINE THE INTENTION OF THE PARTIES WITH RESPECT TO TITLE INSURANCE AND SURVEYS.

With respect to the above points, we respectfully refer to the general statement as set out in 55 Am. Jur. Sec. 97, as follows:

“The cardinal principle in the interpretation of contracts, including offers, options and contracts for the sale of land, is to ascertain the intention of the parties and give effect thereto if it can be collected from the instrument and the circumstances without violating some settled legal principle. The intent of the parties thus expressed is to be carried into effect so far as consistent with rules of law. Words are to be construed in the manner in which the parties understood them; resort is to be had to every

clause and word in the instrument for the purpose of ascertaining that understanding and intent. A land contract is to be viewed as a whole and in the light of the circumstances surrounding its execution, with a view to determining the intention of the parties. Where it consists of or is evidenced by several connected instruments constituting one entire transaction, they must be construed together as a whole, and not as separate, independent purchases or transactions."

It is also evident from the following section in Am. Jur. (Sec. 98) that parol evidence may be used to establish any fact that does not vary, alter or contradict the terms of the instrument or the legal effect of the terms used therein. The court may take into consideration conditions and circumstances under which the parties contracted and construed the contract in the light thereof. See 36 LRA (NS) 313.

Only by the aid of parol evidence can the court ascertain the circumstances under which a contract was made, the relation of the parties, and what was their mutual knowledge. See 55 ALR 1153.

We respectfully submit that there were many things discussed and apparently agreed upon between these parties and the same was then placed in writing, but in the language and terminology of the respondents' choosing. How else can a determination be made of what the respective parties considered that language to mean, without hearing testimony of each of them as to what was discussed and why that provision went into the contract.

4. THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW EVIDENCE CONCERNING PARTIES' INTENTION AS TO USE OF THE WORDS, "OR MORE," IN SAID CONTRACTS AND IN MAKING A FINDING AND DECREE THEREON AS A MATTER OF LAW.

We respectfully submit that testimony and evidence should be had to determine intent of parties with respect to use of the words, "or more," in the contracts. Same legal principles apply as in Point No. 3, but this one is so important it merits separate consideration.

We admit that in most cases this language is put in to give the buyer the right to pay more if he wants to, but in this instance it was put in to explain and justify to seller that more would be paid and so explained to him by Rubey. We respectfully submit that the words, "or more" are not limited to benefits and rights for Rubey alone.

5. THAT THE DISTRICT COURT ERRED IN REFUSING TO PERMIT A JURY TRIAL WITH RESPECT TO FURTHER HEARINGS OR EVIDENCE CONCERNING DISPUTED FACTS, AND INTENTION OF THE PARTIES, AND THIS ERROR WAS IN VIOLATION OF THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Constitution of the United States, the Utah State Constitution and our Rules of Civil Procedure all direct that a jury trial shall be had upon demand of any party, unless it is an equity proceeding or some other situation where a jury trial is not appropriate.

Attention is respectfully directed to *Holland vs. Wilson*, a Utah case decided July 8, 1958, found at 327 Pac. 2d 250. In this case, the court stated as follows:

“We are of the opinion that where the question is presented as to the right to possession, the right to a jury trial is guaranteed. Only by such a construction can the section be liberally construed to effect what we believe were the objects and intent of the same.”

**6. THAT THE TRIAL COURT ERRED IN DENYING APPELLANTS' CONTENTION THAT THE APPELLANTS BE ALLOWED INTEREST AT THE LEGAL RATE ON THE CONTRACT BALANCES.**

The law has long been settled in Utah that interest is allowed on debts overdue, even in absence of statute or contract providing therefor. See *Wasatch Mining Co. vs. Crescent Mining Co.*, 7 Utah 8, 24 Pacific 586. Affirmed 151 U.S. 317, 14 S. Ct. 348.

There is no provision in the contracts between these parties for forbearance of interest, and as such under custom and law interest should be allowed. Or, if there is a question about interest, then evidence should have been taken to determine the intention of the parties as to interest.

7. THAT THE DISTRICT COURT ERRED IN DISMISSING CIVIL CASE NO. 139263 AFTER IT WAS CONSOLIDATED AND WITHOUT THE APPELLANTS BEING GIVEN THEIR STATUTORY RIGHT TO AMENDMENT. THAT THE COURT ALSO ERRED IN DENYING THE CONSOLIDATION OF CIVIL CASE NOS. 124832, 139046 and 139263.

Appellants in this matter, filed a separate action identified as Case No. 139263 in the District Court of Salt Lake County, State of Utah, and the same asking for a declaratory relief with respect to the agreements between these parties. The District Court granted the motion for consolidation and then immediately dismissed the same, and the same was dismissed without appellants being given their statutory right to amendment. It was also error for the trial court to assume jurisdiction of a motion to dismiss a new case, as this matter should have gone before the regular law and motion court for disposition. That the District Court also erred in denying consolidation and hearing of Civil Case Nos. 124832, 139046 and 139263 as they all arise and flow from the contracts between these parties and are all based upon the interpretation of the said agreements, and damages or rights that flow from the same.

8. THAT THE COURT ERRED IN DIRECTING THE CLERK OF THE COURT TO MAKE AND DELIVER A WARRANT



DEED TO THE RESPONDENTS AND AS SET OUT IN THE DECREE OF NOVEMBER 28, 1962.

9. THAT IT WAS ERROR FOR THE CLERK TO PAY ATTORNEYS FEES AND COSTS OUT OF THE DEPOSIT THAT HAD BEEN MADE TO THE CLERK OF THE COURT.

We respectfully submit that the District Court did not have the authority nor the right to direct the Clerk of the Court to issue a Warranty Deed for the appellants as this deprived the appellants of their property without due process of law, was an exercise of authority not extended to District Court Judges and was made in violation of third party rights who had proper liens against the property in question. We submit that the court may have had the authority to issue a decree in which it would be adjudged and decreed that certain property was then the property of respondents, but we respectfully submit that the District Court did not have the authority nor the right to have the Clerk of the Court sign a Warranty Deed for and on behalf of these appellants.

It is respectfully submitted that the District Judge did not have the authority to act as he did and order the clerk to issue a warranty deed for the appellants. Under the provisions of 78-7-18, Utah Code Annotated, 1953, the court has powers conferred by law, and

these powers do not extend to cover the present act of the district court in ordering the execution of a deed.

The general rule requires a judge to exercise his judicial authority in person without delegation to another. The jurisdiction and powers of a judge extend and are limited to those fixed by law. Beyond that he cannot act; nor is he required to do so. See Vol. 48, *Corpus Juris Secundum*, at page 1008.

#### 10. IT WAS ERROR FOR THE COURT TO GRANT ATTORNEYS' FEES TO RESPONDENTS BASED ON THE ACCOUNT OF THEIR ATTORNEYS.

The court herein made an award of attorneys' fees to respondents based upon counsel's statement of account. We respectfully urge this was error for the following reasons:

(a) Any award of attorneys' fees was premature until this present appeal was settled.

(b) Attorneys' fees should be awarded upon reasonable basis and not upon an attorney's account rendered to respondent. On respondent's first motion for attorneys' fees the same was denied but allowance given to amend because counsel had attempted to re-evaluate attorneys' fees previously awarded. Then on hearing, the entire amount was allowed as petitioned, but this covered only attorneys' fees from the last time award was made.

(c) If we made a strict construction against respondents, then no attorneys' fees should be allowed as contract does not mention attorney, but refers to "at-troney."

## CONCLUSION

We respectfully submit that the two or more judgments and decrees entered by the district court should be reversed, and that this matter should be remanded with instructions to the lower court to take evidence and hear testimony with respect to the disputed points of the contracts involved, that the district court be ordered to construe the contracts strictly against the respondents; that direction be given to hear particularly evidence concerning the meaning of the words "or more"; that should the matter be remanded for hearing that all three actions be consolidated for trial and that trial be had by jury.

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