

1964

# Paul Rubey and Carol Rubey v. Morris T. Wood and Ruby J. Wood : Petition of Appellants for Rehearing

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Perris S. Jensen; R. William Bradford, Jr.; Attorneys for Respondents;  
D. Eugene Livingston and William J. Cayias; Attorneys for Appellants;

---

## Recommended Citation

Petition for Rehearing, *Rubey v. Wood*, No. 9833 (Utah Supreme Court, 1964).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/4171](https://digitalcommons.law.byu.edu/uofu_sc1/4171)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

OCT 14 1964

IN THE SUPREME COURT  
OF THE STATE OF UTAH

PAUL RUBEY and  
CAROL RUBEY, his wife,

*Plaintiffs and Respondents*

vs.

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

*Defendants and Appellants.*

Case No.  
9833

Case No.  
10001

Petition of Appellants for Rehearing

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

FILED  
JUN 15 1964

Clerk, Supreme Court, Utah

D. EUGENE LIVINGSTON and  
WILLIAM J. CAYIAS  
405 Continental Bank Bldg.  
Salt Lake City, Utah  
Attorneys for Appellants

Jensen, Jensen and Bradford  
Walker Bank Bldg.  
Salt Lake City, Utah  
Attorneys for Respondent

UNIVERSITY

APR 23 1965

## TABLE OF CONTENTS

	Page
Petition for re-hearing .....	3
Brief in Support of Petition .....	5
Point 1 .....	5
Point 2 .....	7
Point 3 .....	11
Point 4 .....	12

## AUTHORITIES CITED

Vera M. Stout vs. Washington Fire and Marine Insurance Co., 14 Utah 2nd 214, 385 Pac 2nd 608 .....	5
Commercial Credit Corp. vs. Premier Insurance Co., 12 Utah 2nd 321, 366 Pac. 2nd 476 .....	5-6
Huber and Rowland Construction Co. vs. City of South South Lake, 7 Utah 2nd 273, 323 Pac. 2nd 259 .....	6
Lewis vs. White, 2 Utah 2nd 101, 219 Pac. 2nd 865..	6
Elder vs. Clawson, 14 Utah 2nd 384, 384 Pac. 2nd 802 .....	6
Wasatch Mining Co. vs. Crescent Mining Co., 7Utah 8, 24 Pac. 486, affirmed 151 U.S. 317, 12 S. Ct. 348 .....	11
Jensen vs. Lichtenstein et al, 45 Utah 320, 145 Pac. 1036 .....	13

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

PAUL RUBEY and  
CAROL RUBEY, his wife,

*Plaintiffs and Respondents*

vs.

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

*Defendants and Appellants.*

Case No.  
9833

Case No.  
10001

---

## Petition of Appellants for Rehearing

---

TO THE HONORABLE SUPREME COURT  
OF THE STATE OF UTAH:

The above-named defendants and appellants respectfully request a rehearing in the above-entitled case upon the following grounds:

### POINT 1

THE COURT ERRED IN NOT CON-  
SIDERING OR RULING UPON APPEL-

**LANTS' CONTENTION THAT THE AGREEMENTS HEREIN SHOULD BE CONSTRUED STRICTLY AGAINST RESPONDENTS WHO PREPARED THE CONTRACTS.**

**POINT 2**

**THE COURT ERRED IN NOT CONSIDERING OR CONSTRUING THE CONTRACTS HEREIN AS AMBIGUOUS, UNCERTAIN AND UNINTELLIGIBLE, AND IN REFUSING TO GRANT A TRIAL TO DETERMINE THE TRUE INTENT OF THE PARTIES.**

**POINT 3**

**THAT THE COURT ERRED IN REFUSING TO DIRECT LEGAL INTEREST TO ACCRUE ON THE CONTRACT BALANCE.**

**POINT 4**

**THAT THE COURT ERRED IN REFUSING TO CONSIDER APPELLANTS' OBJECTION TO THE ATTORNEYS' FEES AND COSTS ALLOWED HEREIN.**

**Appellants respectfully submit that each of the above grounds are reflection of substantial error and**

that the rulings thereon result in a judgment which is not equitable nor just.

D. EUGENE LIVINGSTON  
and WILLIAM J. CAYIAS

Attorneys for Defendants  
and Appellants

405 Continental Bank Bldg.  
Salt Lake City, Utah

## BRIEF IN SUPPORT OF APPEAL

### POINT 1

THE COURT ERRED IN NOT CONSIDERING OR RULING UPON APPELLANTS' CONTENTION THAT THE AGREEMENTS HEREIN SHOULD BE CONSTRUED STRICTLY AGAINST RESPONDENTS WHO PREPARED THE CONTRACTS.

The court did not refer to nor comment on this point raised, in its opinion of May 25, 1964, and it is respectfully urged that it is a most serious and important part of this proceeding and appeal.

The well-recognized rule is set out in our brief on appeal and also in the recent Utah case of *Vera M. Stout vs. Washington Fire and Marine Insurance Co.*, found in 14 Utah 2nd 214; 385 Pac. 2nd 608. See also *Commercial Credit Corp. vs. Premier Insurance Co.*, 12

Utah 2nd 321, 366 Pac. 2nd 476; *Huber and Rowland Construction Co. vs. City of South Salt Lake*, 7 Utah 2nd 273, 323 Pac. 2nd 259.

The transcript in the original proceeding reflects Rubey as an experienced man in language and real estate dealings, and Wood as a farmer, unskilled in either, and further reflects Rubey as the one who typed up the contract in the one instance and wrote it in long-hand in the other.

As lawyers, we know the injustice and unfairness that can be accomplished by the choice of terms and words by a professional as against a lay man, and that is exactly what took place in this instance. Things were discussed and agreed upon but the language used did not state it as it was agreed. Certainly, this court recognizes the wide difference in experience and business acumen as to these people and that it is an important factor herein. See *Lewis vs. White*, 2 Utah 2nd 101, 219 Pac. 2nd 865 and *Elder vs. Clawson*, 14 Utah 2nd 384, 384 Pac. 2nd 802.

Can a court of equity stand by and allow injustice to be accomplished by such sharp practice? We respectfully urge this court to reconsider this point, to give weight to it and to allow a determination of the true intent of these parties by taking testimony and evidence.

Actually, these appellants still have not had their day in court. This court ruled originally that there was no fraud and the District Court limited its original deci-

sion to that point. Since that time, defendants have not been allowed nor permitted to place testimony or evidence before the court on the interpretation of the contracts. Shouldn't appellants be allowed to explore and take testimony on the contract itself especially where it is drawn so much for one side and interpretation of the contract? Shouldn't appellants be allowed to explore and take testimony on the contract itself especially where it is drawn so much for one side and interpreted for one side—the respondents?

We urge the court to re-examine the record in this matter. Counsel for respondents prepared the interpretation on phases of the agreements and despite many protests and objections of appellants, the interpretation of respondents was adopted. The lower court gave little, if any, consideration to contentions of appellants and ruled against them in almost every instance.

## POINT 2

THE COURT ERRED IN NOT CONSIDERING OR CONSTRUING THE CONTRACTS HEREIN AS AMBIGUOUS, UNCERTAIN AND UNINTELLIGIBLE, AND IN REFUSING TO GRANT A TRIAL TO DETERMINE THE TRUE INTENT OF THE PARTIES.

Attention is respectfully called to the first paragraph of the agreement, dated April 18, 1959, where it states that the sellers are given the unconditional right



to keep all crops of every kind whatsoever until the property is completely paid for, unless otherwise mutually agreed. The decree of the lower Court does not now so provide. This provision also could lead to the conclusion sellers retain full possession until the entire purchase price is paid. Certainly this needs clarification.

The contract then goes on to provide, "That the sellers hereby grant the buyers a release clause, provided the buyers give 18 months or until the land is cropped, whichever time is sooner . . ." We respectfully submit that there is no determination or definition of what constitutes a release clause, and that this can only be determined by having testimony taken concerning what the parties meant that to be. The contract also provides for release of the land at either the east or west end, but does not state who has the choice and the mechanics of effecting any partition release or other disposition.

It is also respectfully submitted that the release clause does not release the buyers in any way. We urge that this provision as to a release cannot be subject to a legal interpretation without having background and evidence concerning what the parties meant by a release clause.

Attention is respectfully called to the indefiniteness of the contract as to dates for payment. There is no exact date set out as to payments and the only way that a determination could be had as to time for payments would be by evidence and testimony. Attention is also called to the fact that there is no possession date given in the contracts, and that this is not known and is not clear from either one of the agreements.

The other side of the coin, with respect to the agreements, is to determine what enforcement remedies the Wood people would have should Rubey not pay on the contract. Could Wood make Rubey buy and on

what terms, what lands could he force him to take and when could he force him to take it and at what point, and how much? All of these questions remain unanswered as far as the agreements are concerned.

It is clear from the original transcript that it was agreed Rubey was to pay \$69,000.00 on or before April 18th of the next year. (See Pages 89-90 and 95 of the transcript.) If this is to be construed as part of the contract, then it should be paid and Wood could meet the commitment that he had made to acquire property in Idaho, and based upon the promise and agreement of Rubey to make the payment of \$69,000.00. The question of "or more," is most important with respect to the \$69,000.00, as this was placed in the contracts as an inducement for Wood to execute the agreement and Wood properly anticipated that he would receive this substantial payment within the year.

Attention is respectfully called to the fact that the agreements make no referral to interest or the forbearance of interest, and while our position on the appeal is that interest accrued as a matter of law, this is a matter that should be reviewed by evidence and testimony to determine what the intentions of the parties were with respect to interest.

Another important point of interpretation with respect to the agreement is to determine why Wood sold his farm and what representations were made by Rubey to obtain the Woods' signatures to the contract.

If one examines both of the contracts at the same time, there is ambiguity, indefiniteness and uncertainty with respect to the following matters:

- (A) Are the contracts annual renewable options or are they preliminary real estate sale contracts.
- (B) What amounts are to be paid and what are the

dates that such payments are to be made, and when is the \$69,000.00 to be paid that was promised in order to induce Wood to sign the agreement.

- (C) There is no time element specified in the contract as to how long it is to run.
- (D) All through both agreements appear the term, "unless otherwise agreed to." This reflects that other arrangements and other discussions were had with respect to the agreement itself.

An overall review of the contract would indicate that the agreements are not an out-and-out purchase agreement but merely an option arrangement as there are no equitable remedies as far as breach is concerned should Rubey breach or violate the agreements.

While the contract makes some reference to other pieces of ground, no determination has yet been made as to those parcels, and part of this lawsuit should be a determination whether those parcels are part of this arrangement or agreement.

We respectfully submit that a careful review of both contracts will reflect that there is serious ambiguity and uncertainty about the agreements with respect to identifying them as to the types of agreements, whether they are options or sales agreements. There is serious question about property descriptions, the terms of the payments, the amount that should be paid initially and what amount should be paid within one year, what length of time is involved with respect to the payments, what interest rate is to be charged on any deferred payments, and what time is to be allowed as to deferred payments. There is also a serious question about possession dates and there is a tremendous lack of mutuality as far as the contract is concerned. Evidence should be taken with respect to determining the purpose Woods sold their

property and the anticipation that they had with respect to monies coming from the sale of this ground to help them buy the property in the State of Idaho.

We urge this Court to decree and order a further hearing so that the words of the agreement can be construed the way the parties talked about them and intended them to be construed. We submit that Appellant Wood has never had the opportunity to have his day in Court as to a determination of the parties contracts and what was intended.

### POINT 3

#### THAT THE COURT ERRED IN REFUSING TO DIRECT LEGAL INTEREST TO ACCRUE ON THE CONTRACT BALANCE.

Certainly as a matter of knowledge and information for counsel, future litigants and for efforts of appellants herein, a definite ruling should be made as to the contracts and whether interest accrues if no mention is made of it in the contracts.

It has long been the law in Utah that interest is allowed on debts overdue, even in absence of statute a contract provides therefor. (See *Wasatch Mining Co. vs. Crescent Mining Co.*, 7 Utah 8, 24 Pac. 586, affirmed 151 U.S. 317, 14 S.Ct. 348.)

We respectfully argue that the court should rule as a matter of law that interest is due on the balance of the contract unpaid. We reiterate, however, that in view of the lack of an expression in the contracts as to

interest, evidence should be taken to determine what the parties intended.

#### POINT 4

THAT THE COURT ERRED IN REFUSING TO CONSIDER APPELLANTS' OBJECTION TO THE ATTORNEYS' FEES AND COSTS ALLOWED HEREIN.

A review of the record in this matter will reflect no testimony or evidence as to the attorneys' fees allowed by court to respondents. The Bar Schedule of fees was not introduced, no testimony was given as to time put in by counsel for respondents and no cross-examination or counter evidence was allowed to appellants. Respondents' attorney told the District Court in conference that so much time and charges had been put in on case and court granted the figure requested. We submit that appellants as a matter of equity and of law are entitled to at least cross-examine and to put in testimony if need be, about the reasonableness of attorneys' fees. Certainly, appellants should not be penalized for unnecessary conferences or time taken up by respondents without need therefor, and no testimony or evidence was taken to show all time charged was actually spent on this case, or that it covered matters involved in the appeals or hearings after one attorney's fee had been allowed. Not one scintilla of foundation was made or offered in support of fees allowed.

In the matter of *Jensen vs. Lichtenstein et al*, 45 Utah 320, 145 Pacific 1036, the Utah Supreme Court commented at length on attorney fees and said:

“By a reasonable fee no doubt, is meant one which is reasonable under all the facts and circumstances of each case. What is reasonable, therefore, in a large measure at least, must depend upon the amount in controversy, the labor, the responsibility imposed upon the attorney in obtaining judgment, as these things may have arisen from the issues presented and tried.”

In the present case, there was no evidence of what hourly rate was charged, what time was put in the case, or who controlled the time required for the case. In other words no evidence at all was presented with respect to justifying or proving the reasonableness of any attorney fees.

We submit that in the interest of justice and fairness that this matter be referred for further hearing.

Respectfully submitted,

**D. EUGENE LIVINGSTON and  
WILLIAM J. CAYIAS**

Attorneys for Appellants  
405 Continental Bank Bldg.  
Salt Lake City, Utah