1984

James F. Trees v. Walter Lewis : Appellant's Brief On Appeal

J. RICHARD BELL
JACQUE B. BELL
BELL & BELL
303 East 2100 South
Salt Lake City, Utah 84115
Telephone 487-7756

Attorneys for Defendant-Appellant Walter Lewis

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES F. TREES)
Plaintiff-Respondent)
vs.)
WALTER LEWIS) No. 19333
Defendant-Appellant.)

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ALLEN, THOMPSON & HUGHES
Michael D. Hughes
Attorney for Respondent
148 East Tabernacle
St. George, Utah 84770
Telephone: (801) 673-4892

SNOW & NUFFER
Attorneys for Respondent
P.O. Box 386
St. George, Utah 84770
Telephone: (801) 628-1613

BELL & BELL
J. Richard Bell
Attorneys for Appellants
303 East 2100 South
Salt Lake City, Utah
Telephone: (801) 487-7756

J. RICHARD BELL
JACQUE B. BELL
BELL & BELL
303 East 2100 South
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Telephone: (801) 628-1613

BELL & BELL
J. Richard Bell
Attorneys for Appellants
303 East 2100 South
Salt Lake City, Utah
Telephone: (801) 487-7756

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OTHER AUTHORITY CITED

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Nature of the case

Plaintiff brought an action for specific performance to acquire the Lewis Ranch. He claimed prior to trial that there was an agreement which contained an Option and which Option he exercised. Plaintiff claimed that there was no agreement but merely an outstanding counteroffer which the Plaintiff never accepted.

Disposition of the Lower Court

This case was heard before Honorable J. Harlan Burns, District Judge of the Fifth Judicial District in and for Washington County, State of Utah, who impaneled an advisory jury, adopted the jury's answers to Special Interrogatories and granted a Judgment and Decree of Specific Performance.

Relief Sought on Appeal

Defendant Lewis seeks a reversal of the Judgment and Decree or, in the alternative, a Decision of this Court granting Defendant a New Trial.

Statement of the Facts

A written Option Agreement was prepared for Plaintiff- Respon Trees by a St. George attorney, Steven Snow. Attorney Snow signed the agreement as "Attorney in Fact" for plaintiff Trees after whic it was presented by a real estate agent, Michael Hatch, to Defenda Appellant Lewis at the Chicago Airport on December 4, 1980, about year before Defendant Lewis expected to retire and return to Utah to live. Hatch worked for Deseret Realty which was owned by Real Estate Agent, Earl Milne and his wife. The Option Agreement perta to the purchase and sale of the 160 acre Lewis Ranch which abuts Zion National Park near Springdale, Utah.

The ranch is in a basically non-accessible area but has there an historical old home known as the Shunesberg Mansion, a resdence a guest house, a small lake, a swimming pool, with water rights an although basically non-productive was a refuge for Defendant Lewis who spent his summer and often his Christmas vacations there as well as visiting on other occasions and who looked forward to his retirement so that he could use and enjoy the ranch. He acquired it after the death of his brother who owned it and lived there for many years. Lewis did not desire to sell the ranch having turned down several offers and not having ever listed it for sale. His wife had some physical health problems and since there was no phon or electricity at the Rach, he did not like to leave her there alo He had a lot in Springdale on which he intended to build a home. never at any time set a purchase price, the price in this instance

having been one offered by the Plaintiff. James F. Trees, who resided in New York, contacted real estate agent, Earl Milne, described what type of property he was interested in finding; flew over the Lewis ranch and other property in the area and hired Milne and/or his company to acquire property or options on property, and Trees agreed to pay all real estate fees in connection with any purchase. Agent Milne contacted Lewis who made it clear to Milne and to plaintiff Trees that Lewis did not desire to sell the ranch. Lewis had several conditions primary of which was retaining 60-day visitation rights in the summer and other visitation rights to hike and move about the ranch. He desired that the buyer be a person with whom he could have a good relationship so that he could enjoy his visitation rights, monitor projects which were going on, make a contribution to the overall condition of the ranch and preservation of the area and the historical background and history of the ranch, and that the buyer be willing to make a gift or donation to BYU.

Trees visited BYU to see if he approved of the school, which he did. Efforts were made with BYU to handle the transaction so that BYU would obtain part of the sales price as a gift or donation but that effort failed because of tax law complications.

The Option Agreement contained, inter alia, two important provisions, both of which are found in paragraph 12 of the Agreement:

> 12. (First) This document is intended as the final and exclusive agreement of the parties, and all other agreements related to this property, between these parties are superseded hereby and merged herein. (Second) This document may not be amended, modified or revoked unless by a writing signed

by the parties. (The words "First" and "Second" have been added for purposes of emphasis)

The Option Agreement, Exhibit 5 and entitled "Real Estate Option" made no mention whatsoever of Appellant Lewis' retained visitation rights, and Lewis was appalled when he found no ment of visitation rights in the Option Agreement, particularly in v of the exclusion and merger clause set forth in paragraph 12. H had little experience in land transactions, and none with optio However, he did refuse to sign until there was added to the bot of the Option Agreement the following:

> Additionally, it is understood that there exists an agreement between optionee and optionor for mutually agreeable visitation rights for optionor.

Further, paragraph 9 was amended relative to the prepayment pen clause. After these changes were penned in, at the airport, on then did Lewis sign the Option Agreement.

At this point, the Option Agreement became a "Counteroffer and will be referred to as such hereafter, except as otherwise noted. The Counteroffer was never accepted in writing as requi by paragraph 12 (or otherwise) by either Attorney in Fact Snow the Plaintiff, Trees.

The Counteroffer was signed by Lewis on the 4th day of December, 1980. Thirteen days later on December 17, 1980, Lew drafted an "AGREEMENT" between himself and Trees which provided that there was an agreement between the parties wherein Lewis retains certain visitation rights for the remainder of his life which includes 60-days annual "in residence" at the ranch and

the opportunity to visit, move, ride, hike, and moniter projects on the property at other times. Lewis signed the Agreement (Exhibit 14) and sent it to Agent Hatch, together with a covering letter (Exhibit 15) requesting Hatch to have Trees sign the Agreement and return a signed copy to him.

The Counteroffer required the option set forth therein to be exercised on or before December 31, 1980. Because of problems Trees was having with regard to the purchase by him of DeMille property which abutted a part of the Lewis ranch, Trees, through Attorney Snow asked for and received extensions of time to and including the 30th day of May, 1981, in which to exercise the Counteroffer.

On or about the 27th of May, 1981, Lewis was informed by Trees that he was exercising his option to purchase the ranch. When Lewis asked about his visitation rights, and told Trees he had no option until Lewis received his write-up on his visitation rights, Trees replied that Lewis had no visitation rights, no 60-day visitation rights, and that Trees did not have any information about them. Whereupon Lewis told him to call Hatch. Trees said that he would and that he would call Lewis back. Trees immediately contacted Attorney Snow and for the first time became aware of the agreement dated December 17, Plaintiff's Exhibit 15. On May 29, Trees sent a letter to Lewis which had been dictated to Trees by Attorney Snow which stated: "In accordance with the terms of our contract and the extensions thereof, I hereby exercise my option to purchase the property in Utah . . . ." The letter does not mention the

December 17th Agreement nor does it mention visitation rights at a

Approximately fourteen days later, following Lewis' consultat with an attorney, the attorney for Lewis delivered a letter dated June 12, 1981, to attorney Snow withdrawing the Counteroffer and stating that the parties were not in agreement. Exhibits 16, a handwritten letter, and 49, a typed copy of the handwritten letter

During the next ten days, Trees had Milne present to Lewis a letter form agreement,and an Agreement, both signed by Snow as Attorney in Fact for Trees, one dated June 19, 1981, the other dated June 23, 1981. The letter agreement extended some visitatic privileges which consisted of an invitation to Lewis as a friend o Trees and based upon guest privileges to visit and temporarily remain as a guest on the property, provided Trees or other guests were not on the property and further provided that arrangements must be made and approved by Trees prior to any visit; it did not bind his heirs and assigns. The Agreement of June 23 acknowledge that Lewis had certain visitation rights but limited them to hike or ride horseback through the property, subject to receiving permi in advance for each visit, but did not provide for any in-residen of any kind. These letters are designated Exhibits 28 and 29, respectively, both of which were excluded by the Court at trial a offers of settlement. Trees did not sign either of them either letter although each contained a line for his signature. Notwit standing the foregoing, Trees testified at trial that he had always been willing to grant the visitation set forth by Lewis, including the specific visitation set forth in the December 17

Agreement.

All payments tendered by Trees had been by check and none were cashed and all checks were returned immediately following the withdrawal of the Counteroffer. Lewis told Snow that he did not want checks sent to him! Finally Snow honored Lewis' request and stopped sending checks.

This case was tried with an advisory jury with the Court adopting the Findings or Verdict of the jury.

Additional Facts are hereafter set forth.

ARGUMENT

POINT 1

THE COURT ERRED IN FAILING TO FIND THAT THE COUNTEROFFER WAS NEVER ACCEPTED.

The Jury found that the document entitled Real Estate Option dated November 5, 1980, as amended before signing by Lewis to provide for visitation rights together with the December 17 Agreement which spelled out the visitation rights constituted a Counteroffer. Trees rejected that Counteroffer. The Counteroffer had to be signed by Trees as required by the Option in paragraph 12. Neither the Option of December 5 as amended nor the December 17th Agreement was signed by Trees or his attorney in fact Snow. In addition, in the telephone conversation on May 27 when Trees said he was exercising his option he testified, T. Vol I, p. 171"

> . . . And then he (Lewis) blurted out, "Where are the rights for my 60-day rights?" And I didn't know anything about his 60-day rights. And I said, "Walter, you have no rights, 60-day rights. What are you talking about?" And he said, "You

call Mike Hatch, he knows." And I said, "Okay, I'll call Mike Hatch and then he'll call you right back or I'll call you right back. That was the conversation basically.

Trees thought to himself "Oh my God, Walter is overreaching." Neither Trees nor Hatch ever called changing the rejection of the Counteroffer.

The power of acceptance created by an offer or counteroffer i terminated by communicated rejection of the offer, and it makes nc difference that a time period has been given for accepting the offer or counteroffer or that the offer or counteroffer requires acceptance thereof in writing. I Corbin, Contracts, Sec. 94. P. 389 (1963). Trautwein v. Leavy, 472 P.2d 776 (Wyo.) (1970)

Having lost the power to accept, the Plaintiff no longer had power to accept and could not accept thereafter in the absence of Lewis again reaffirming the offer, which he did not do. Although he probably would have done so prior to withdrawing the counterof provided Trees had signed and delivered to him a copy of the Dece 17 Agreement, T. Vol 1, p. 107.

Trees knew of the residency requirement prerequisite insiste on by Lewis in all negotiations. Even though he had not seen the December 17th Agreement when he rejected the counteroffer, he kne of the residency requirement as he had received a letter dated December 6, 1980, the day after the counteroffer was made by Lewi addressed to the Superintendant of Zions National Park wherein Lewis pointed out that he was going to maintain some involvement and part time residency in the ranch during his life time. Exhib 12. Further, he had ample time to change his rejection if he

desired to do so. He did not. On May 29, he wrote a letter to Lewis wherein he stated, "In accordance with the terms of our contract and extentions thereof I hereby exercise my option to purchase the property in Utah." Attorney Snow dictated that letter. He undoubtedly knew that matters dealing with rights in land had to be in writing in order to comply with our Statute of Frauds Title 25 Chapter 5 Utah Code Annotated 1953, an amended, and that the reservation of rights in the ranch for visitation purposes required compliance with Chapter 5 and particularly Section 1. There was no other collateral visitation document in writing supporting the December 17 Agreement until the June 19 and June 23 Agreement which which were after the time of the withdrawal of the Counteroffer.

The case of R. J. Daum Const. Co. v. Child 247 P2d 17, (Utah) (1952), recognizes that the Plaintiff in a Specific Performance case has the burden of proof and that a reply or offer perporting to accept an offer but which adds a qualification or requires performance of conditions is not an acceptance but a Counteroffer.

Further, in the case of Specific Performance, the burden of proof on the Plaintiff is strong. This is pointed out in the case of Pitcher vs. Lauritzen, 423 P2d 491 (Utah) (1967), wherein this Court approvingly cites the 1946 Colorado Case of Bowman vs. Reyburn, 170 P2d 271, where it is said by a unanimous Court at page 276 as follows:

> In an action for Specific Performance, a contract must be free from ambiguity and it must be clearly established that the demand and performance is in accordance with the actual agreement of the parties (Citations omitted), 'a greater degree of certainty is required in the terms of an agreement, which is to be specifically executed in

> equity, than is necessary in a contract which is to be the basis of an action at law for damages', Pomeroys Specific Performance of Contracts, 3d Ed., §159, in Ward vs. Ward, 94 Co. 275 30 Pd 853, also in Mestas vs. Martini, 113 Col. 108, 155 Pd 161. ' There is no better established principle of equity jurisprudence than that Specific Performance will not be decreed when the contract is imcomplete, uncertain or indefinate.' Dodge Bros. vs. Williams Estate Co., 52 Nev. 36 287 P 282, 283 .....

It would seem to follow that in this case of a Counteroffer. This burden fell on the Plaintiff, in view of the foregoing, to spell out in his May 29 letter that he was accepting the Counteroffer, o that he was accepting the "Contract" as amended by Lewis and as amended by the December 17 Agreement. For, in fact, there was no "Contract" only an outstanding Counteroffer. The letter assumes a "Contract" and does not accept a Counteroffer but states I hereby exercise my option". It assumes a contract existed. Further, the silence of Trees left his oral rejection of the counteroffer very much in effect, for silence is not to be deemed an acceptance Kimball Elevator Co. vs. elevator Supplies Co., 272 P2d 583 (Utah) (1954).

The Plaintiff had the burden of proof in this case which he d not sustain. Also, the Option Agreement of December 4 was drawn b Attorney Snow and signed by him as attorney-in-fact and he dictate the May 29 Agreement, and to that extent he is "a party" to the documents; he had knowledge of the December 17 Agreement shortly after its signing by Lewis. An instrument is to be construed against the person that draws it, and this is particularly true where the attorney is a party. It is submitted that the same is basically true where the attorney is the attorney-in-fact as well

as the attorney for the individual for whom he draws documents, and the same should be construed against him and his client. Continental Bank and Trust Co. vs. Bybee, 306 Specific Second 773 (Utah) (1957).

POINT II

THE COURT ERRED IN NOT FINDING THAT THERE WAS NO MEETING OF THE MINDS BETWEEN THE PARTIES.

It is obvious from the foregoing argument in Point I that there was inter alia no meeting of the minds between Lewis and Trees. That conclusion is further supported by the Agreement of June 19 and June 23 signed by his attorney-in-fact relating to visitation provisions. As noted, the June 19 letter agreement was an "invitation" "based on friendship" and offered as "privileges" to Lewis and his immediate family. The Agreement of June 23 reads as follows:

AGREEMENT

During his lifetime, Walter Lewis shall retain certain visitation rights to hike or horseback ride through the property.

Mr. Lewis shall have the right to invite a few of his close friends or family members to accompany him.

Mr. Lewis shall notify Mr. Trees or his foreman concerning these visits and shall receive permission in advance for each visit.

This agreement shall be binding on the heirs, assigns, and successors in interest of James F. Trees.

DATED this 23rd day of June, 1981.

It provides for no residency, 60-day or otherwise. It requires advance permission. However, the rights retained by Lewis in his December 17 Agreement are specific and clear:

AGREEMENT

As part of the contract for sale of certain properties by Walter M. Lewis to James F. Trees, there exists an agreem between the parties that Lewis retains certain visitation rights during the remainder of his life, and may invite famil and friends to accompany him. These rights include:

> 60 days annually of "in residence" at the ranch house, the dates to be arranged by each party endeavoring to minimally inconvenience the other.
>
> The opportunity to visit or move through the prope ties at other times to ride or hike to remote points of to monitor projects, provided that precaution is always taken not to invade the privacy of Trees.

This agreement is binding on the heirs, executors, administr successors, and assigns of the respective parties hereto.

This agreement recognizes what gentlemen would and ought to do in close situation as was contemplated by the parties in that in-res provision required that "each party endeavoring to minimally inco venience the other." It does not say a party shall not or cannot but is consistant with the language that they endeavor not to interfer. It is somewhat stronger with regard to other visitaito in that "precaution" is to be taken not to invade the privacy of Trees. Again this is what gentlemen or neighbors with good feeli toward each other would do, but here again it is not a prohabitio and it does not require first obtaining the consent of Trees or h foreman. Clearly the parties have said different things, and the was no mutual consent or meeting of the minds on this very essent element or term as required to form a binding contract. 17 Am Ju 2d, Contracts §18, p. 354.

POINT III

THE COURT ERRED IN FAILING TO GIVE TWO REQUESTED INSTRUCTION

RELATIVE TO THE REJECTION OF AN OFFER, AND IN FAILING TO GIVE REQUESTED INSTRUCTIONS RELATIVE TO THE STATUTE OF FRAUDS.

The following two requested instructions by Lewis were refused and not given by the Court to the Jury:

> The power of acceptance created by an offer or counter-offer is terminated by a communicated rejection. This is true even though a definite time was given by the offeror for considering his offer or counteroffer and the rejection is made before that time is expired. Likewise, this is true regardless of whether the offer or counteroffer requires or does not require the acceptance to be made in writing. R. Vol II p. 256.

and

> An offer or counteroffer once rejected is not subject to being accepted at a later date in the absence of the offer or counteroffer being renewed by the party making the same. R. Vol II p. 260.

The law which Trees relied upon is already set forth above at page 8 namely, Corbin on Contracts and the case of Treautwein vs. Leavy. Had these instructions been given, the jury would have had a basis to find that the Plaintiff had rejected the Counteroffer as argued in Point I. Such a finding would have eliminated any question for the jury relative to the May 29 letter. Lewis was prejudiced by the failure to give this instruction. There could be no finding of the jury on this point since it was not submitted by the Court, and it can be assumed that the Court did not concur with the instruction or the law supporting it since the failure to give this instruction was raised in the MOTION FOR JUDGMENT FOR THE DEFENDANT, R. Vol. 3 P. 196, DEFENDANT'S MOTION FOR NEW TRIAL, R. Vol. 3 P. 264 and AFFIDAVIT attached thereto and DEFENDANT'S OBJECTION TO PLAINTIFF'S PROPOSED FINDINGS OF FACT, R. Vol. 3 p. 107.

The Requested Instruction relative to the Statute of Frauds

> An agreement pertaining to land or an interest in land required to be in writing. If such agreement is not in writ it is void and of no force and effect. Statute of Frauds, U Code Annotated, Chapter 5 Title 25. R. Vol II 274 and 288.

Under the terms of the Option Agreement, a Warranty Deed was required to be delivered transferring title of the Ranch in fee t Trees. As noted elsewhere, Trees did not want a cloud on his dee (title). However, Lewis was entitled to have "declared" his reta interest in the Ranch in written form, otherwise the Statute of Frauds would have prevented him from making any successful claim to his retained visitation rights, and the jury was entitled to s know, and question the motives of the Plaintiff and his position there was a mutual oral agreement for visitation rights. Oral visitation rights gave the plaintiff many advantages.

The giving of each of these instructions could and would hav resulted in the jury finding for Lewis. The errors are prejudici Webb vs. Snow 132 P.2d 114, 102 Utah 435.

POINT IV

THE COURT ERRED IN DENYING AS ADMISSIBLE EVIDENCE THE AGREEM OF JUNE 19 and JUNE 23.

The two Agreements signed by Snow as attorney-in-fact were n admitted into evidence because of the objection that they were offers of compromise. T Vol. II, commencing page 339. Before th objection in ruling, Trees had testified that he had always been willing to accept the Agreement of December 17. These letters we in direct contradiction to that statement and position. They wer signed by his attorney-in-fact and he was bound by them and he di not claim that they did not represent his point of view. There i

nothing in these Agreements which indicate that they are offers in compromise they speak for themselves what Trees was willing to give to Lewis by way of visitation. They represent the very tools of cross examination and the purpose of cross examination in finding out the truth by pointing out the inconsistancies in prior statements of a witness and generally impeach him.

POINT V

THE COURT ERRED IN PERMITTING THE SURPRISE WAIVER OF ATTORNEY-CLIENT RELATIONSHIP AND ALLOWING ATTORNEY SNOW TO TESTIFY AS TO INTENTION OF LETTER OF MAY 29.

On the second day of trial the Court permitted over the objection of Lewis, to permit the Plaintiff to waive his client-attorney relationship with Snow, so as to permit Snow to testify as to the intention of Trees and Snow relative to the May 29 letter in which Trees exercises his option under the contract. This action came as a complete surprise to Lewis who had not prepared for trial on that basis. The large record, transcript and numerous and long Depositions primarily resulted from the position taken by the Plaintiff that there was a contract and the option therein was exercised by the letter of May 29, 1981, and the attempt by Defendant Lewis to determine how and in what manner the contract came about, how and in what manner the option came about, and how and in what manner the claimed option was exercised. The position of Lewis was always clear that there was a Counteroffer which was never accepted. It was not until trial that the Defendant really acknowledged the

existance of a Counteroffer, and the claimed acceptance thereof. The COMPLAINT filed by Snow on July 29, 1981, makes no reference to a Counteroffer although the position of Lewis that a Counteroff had been made and withdrawn had been known to him in writing sinc June 12, 1981. The FIRST AMENDED COMPLAINT filed by a new attorn on April 30, 1982, contained fourteen counts and eighty-four para all of which deal only with the December 4th option and none of w makes reference of any kind to the December 17th Agreement. Only four paragraphs deal with the question of a Counterclaim and they are grudgingly conditional and read as follows:

> 57. That in the event Defendant's position obtained on advise from counsel that he had made a counteroffer is sustained, knowledge of such a position was conveyed only as of June 12, 1981.
>
> 58. That even were the option dealt with as a counteroffer;
>
> (A) Plaintiff's failure to give reasonable, or for that matter any, notice of his rejection of the same shortly after its execution on December 4, 1980 (Exhibit A) acts as an acceptance of the so-called counteroffer; indeed Plaintif adopted a course of behavior indicating assent to such modification; and/or
>
> (B) Plaintiff at all times did accept the so called counteroffer; and/or
>
> (C) Plaintiff was, upon notification of Defendant's election to designate the option as a counteroffer, not give reasonable notice or indeed any notice or opportunity, to accept or reject the same.
>
> 59. Whether designated as an option or a counteroffer, Plaintiff has been and is ready, willing, and able to perfor his portion of the parties' agreement.

Interrogatories were sent to Trees requesting in Interrogatory No. 15: "Please state all of the facts which you claim to suppor

the allegations in paragraph 58 B; designate each witness who will testify in support thereof and state the substance of the testimony of each witness." The Answer sets forth no facts but merely states that the Plaintiff will rely upon the Depositions of Trees, Snow, Lewis and Milne together with a check. These Answers were filed and mailed December 1, 1982, approximately two months before trial which commenced on February 9, 1983. In an almost identical request with regard to paragraph 59, the Plaintiff responded substantially the same way but referred to the facts set forth in Plaintiff's Pre-Trial submitted to the Court on November 12, 1982. R Vol. 2 pg 7 & 8. An Affidavit of the Plaintiff also filed November 12, sets that he has read the facts set forth in the Pre-Trial wherein he acknowledged having read the proposed pre-trial order and "to my satisfaction these are the facts in the case and I subscribe under oath to them." R Vol 1 p. 230. The proposed Pre-Trial Order referred to is found commencing on P. 235 of the same volume. The following facts are contained in the proposed Pre-Trial Order: That any alleged Counteroffer made by the Defendant was in fact accepted through performance (P 239); that Lewis had added to the December 4 Agreement visitation rights which rights had been orally discussed and previously agreed to between the parties (P 253); that Lewis demanded in a telephone conversation that Trees provide him with a write up of their agreement on visitation (P 261); that Trees indicated to Hatch that he would consider putting the oral agreement into writing so long as it did not cloud the Deed (262); that Milne and Trees tried at least a dozen telephone calls to

Lewis even pleading with Lewis to tell them what he wanted relati to a write up with his visitation rights (262); that the first ti the parties or their agents heard of the concept or word "Counter was June 12, 1981 (263); that companion proposals to memorialize the visitation rights, were mailed by Milne to Lewis on about Jun

At a hearing on November 12, 1982, an ORDER was entered by t Court wherein all correspondence between attorney Snow and Trees was submitted to the Court in camera so that the Court could revi those letters which may reflect in whole or part on the relations of the attorney-in-fact so that the attorney-client privilege would be preserved. The client-attorney privilege was asserted i the Deposition of Snow, dated October 28, 1981, at page 4, and th Deposition inquired only into Snow's activity as attorney-in-fact and did not inquire into matters claimed to be within the privile The matter of Snow's correspondence came before the Court based o a Motion by the attorney for Lewis. The Order resulted from the hearing on November 12, 1982, and is dated by the Court "Nunc Pro Tunc" on the 29th day of March, 1982, with the word "November" stricken out, but the certificate shows that it was mailed on the 16th day of November, 1982. R. Vol II p. 48. There was never an claim or assertion prior to trial that the Plaintiff accepted the Counteroffer of the Defendant specifically including the Agreemen of December 17. However, based on the ruling of the Court, Snow was permitted to testify what was the intention and the conversat between him and the Plaintiff Trees relative to the claimed accep letter of May 29. Had that intention been disclosed by pleadings

or prevented from being disclosed by virtue of the attorney-client relationship, the Defendant Lewis would certainly have explored the same.

A case similar to the present one and which appears to be in point is that of Phipps vs. Sasser, 445 P.2d P. 624 (Washington) (1968). The Court had before it a Motion to depose Plaintiff's physician before trial, and Plaintiff had asserted the physician-patient privilege. The Court upheld the lower Court which denied the Motion to take the Deposition. However, the Court opined at pages 628 and 629 the following:

> We would agree that whenever it does become apparent that the plaintiff must decide in favor of waiver, then that waiver should not be delayed until the trial itself. The plaintiff should not have the unfair tactical advantage of a trial waiver which almost invariably results in a continuance and, frequently, in the dismissal of the action and another trial.
>
> Certainly, at some stage in the pre-trial proceedings, the plaintiff must decide whether he is going to call his treating physician or physicians, and, if he is, then the defendant is entitled to know it in time to take the depostion of such physicians or physicians and prepare to meet their testimony.
>
> Our civil rules bear the same numbers as the federal rules, which we have adopted with few changes. The federal courts, operating under identical rules, seem to have had little difficulty in accelerating the waiver of privilege on a case-to-case basis without the necessity of a blanket waiver.

This case would seem to be in league with the spirit of the fair play and interest of justice doctrine set down by this Court in, F. M. A. Financial Corporation vs. Build, Inc. 404 P.2d 670 (Utah) (1965) wherein there had been a failure to plead an affirmative defense, but the lower Court permitted the defense to be

asserted but this Court noted: " . . . If the interests of justic so require and the opposing party is given a fair opportunity to meet such a defense, the trial court may permit the issue to be tried . . . ." As is shown above, Lewis had no fair opportunity to meet the testimony of Snow because of the assertion of the attorney-client relationship, the pleadings, the failure to give any notice of such testimony although great effort was made to obtain the same, and objection was made at the time of the waiver the introduction of the evidence. Justice requires that Defendar Lewis be given the opportunity to take Snow's Deposition as to matters heretofore hidden and covered from the Defendant so that he may adequately prepare to meet the testimony in a New Trial.

POINT VI

THE COURT ERRED IN GRANTING PLAINTIFF ATTORNEYS' FEES.

This point is based on the assumption for purposes of argum that the Court may uphold the judgment of the lower Court.

The Court granted that attorney's fee in the sum of Forty-Five Thousand ($45,000.00) Dollars as a reasonable attorney's fe However, the Plaintiff had asked for a sum double that amount. cost of this trial and particularly attorney's fees on both side are enormous because of the conduct of the Plaintiff as set fort herein and particularly his change of position at trial in final announcing that he had accepted the Counteroffer of the Plaintif rather than insisting that there was a contract between the part had been done prior thereto and as has been set forth above. Th

was no need for the amount of work and effort put into this case nor the waste of the Court's time. Had the Plaintiff originally come forth and said that he had accepted the Counteroffer, the issues would have been very limited and quickly tried following a short discovery. Instead, the Plaintiff makes light of the Counteroffer theory, until trial, and suggests that it was a figment of the imagination of the attorney for Trees rather than looking at the facts to which it finally conceded in claiming to have accepted the Counteroffer. The fee is not reasonable. Reference is made to DEFENDANT'S OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT RE: ATTORNEY'S FEES. R Vol. III commencing at page 235, which further sets forth the Defendant's position without enlarging this brief.

POINT VII

THE COURT ERRED IN SUBMITTING THE FIFTH SPECIAL INTERROGATORY TO THE JURY.

The Fifth Special Interrogatory reads as follows:

> 5. " We, the jury duly empanelled in the above-entitled case, find from a preponderance of the evidence that Exhibit 26 constituted a notice of default as provided for in Exhibit 5, and that the Plaintiff failed to cure or correct said default, and therefore find in favor the Defendant, Walter Lewis, on all issues." R. Vol II p 333.

The Interrogatory was not necessary but was confusing and misleading. Counsel for the Defendant, in front of the jury, stipulated that Exhibit 26 which is the letter of June 12th wherein the Counteroffer is withdrawn never was intended to be a notice or a compliance of the Default as provided for in Exhibit 5, the December 4th Agreement.

That had never been the position of Lewis. Such a position would have been contrary to the very existence of a counteroffer since would have recognized that the December 4th Option Agreement was binding contract and there could not have been an outstanding counteroffer to withdraw. The Affidavit of the Defendant's attor in connection with the Motion for a New Trial and deals with the circumstances surrounding the Special Interrogatory No. 5, commen at P. 272 R. Vol. III. Prior to the jury's leaving, Defendant's counsel approached the Bench together with Plaintiff's counsel an objected to the Interrogatory that it in affect directed a verdic in favor of the Plaintiff and requested that the Interrogatory no be submitted. Within fifteen minutes after the jury left, Defend counsel again approached the Court together with Plaintiff's Coun and requested that the Court withdraw from consideration of Inter rogatory No. Five. The matter was again taken up after the jury returned and further objection made and denied by the Court. T Vol. IV 730-735. This Interrogatory could not help but confuse the Jury for it suggested there was a contract that that Lewis' letter of June 12 may have attempted to comply with the Default Provision. The Jury had to be confused and the Defendants highly prejudiced.

SUMMARY

One might say, what is all the fuss about since the Plaintif buyer is now willing to give to Lewis everything which Lewis requested including the visitation rights and per the December 1

Agreement. In fact that attitude was pursued very heavily by the lower Court, never on record, in exploring settlement of this case to the point that counsel for Lewis felt he was being admonished by the Court for not pushing his client into a settlement. R. Vol III p. 9, 10. AFFIDAVIT OF DEFENDANT'S ATTORNEY IN SUPPORT OF MOTION FOR NEW TRIAL. The best answer is that given by Defendant Lewis in T. Vol III p. 643:

> ...Well, Milne precipitating it and Trees disclaiming any responsibility for his agents, I told myself, 'Look, I'm too old for the rest of my life to put up with this kind of inter-activity that was always leading -- keeping me on tenderhooks.' And I think it was at that time that I called the lawyer and decided that I'd better go in another direction.

Defendant Lewis is still on "tenderhooks". This case was brought before this Court so that the law of contracts as pertains to this case could be firmly established to the end that Defendant would obtain the relief to which he is entitled.

It is submitted that the Judgment and Decree of the lower Court be reversed and Judgment be entered in favor of Defendant Lewis, or, in the alternative, that this Court grant a new trial, a trial that would now be short and to the point.

Respectfully submitted this ~~2nd~~ 3rd day of April, 1984.

BELL & BELL, by

J. Richard Bell
Attorneys for Defendant-Appellant
Walter Lewis

MAILING CERTIFICATE

I do hereby certify that I mailed two true and correct copies of the foregoing Defendant-Appellant's Brief on Appeal, postage prepaid this ~~second~~ third day of April, 1984, to:

ALLEN, THOMPSON & HUGHES
Michael D. Hughes
Ronald W. Thompson
148 East Tabernacle
St. George, Ut 84770

attorneys for the Plaintiff-Respondent.

Richard Sell