

1984

## James F. Trees v. Walter Lewis : Appellant's Reply To Cross Appeal of Defendant-Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES F. TREES,	)	APPELLANT'S REPLY TO CROSS
Plaintiff-Respondent	)	APPEAL OF DEFENDANT-RESPONDENT
vs.	)	
WALTER M. LEWIS,	)	Case No. 19333
Defendant-Appellant	)	

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Contrary to Plaintiff-Respondent's (hereafter called Plaintiff) Cross Appeal statement, Appellant was in no way aware, nor is he now aware, that he compelled Plaintiff Trees to purchase or "to be able to purchase" the DeMille property and in fact the Appellant specifically negates that representation. Trees entered into his purchase with the DeMilles long before he entered into any negotiation with Appellant Lewis. There was no provision in the DeMille purchase which tied it to or made it subject to the purchase of the property of Appellant Lewis. The DeMille transaction was held up over an argument by the DeMille family that they wanted visitation rights to the family cemetery. Those rights were substantially reduced in exchange for an additional sum of money paid by Trees to DeMilles. The trial Court also negated that contention when it ruled that the Plaintiff had not presented a prima facie case. It is highly

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANT'S REPLY TO  
CROSS APPEAL OF PLAINTIFF-RESPONDENT

Appeal and Cross-Appeal from Judgment of Fifth  
Judicial District Court of Washington County,  
State of Utah, the Honorable J. Harlan Burns,  
District Judge.

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**FILED**  
OCT 15 1984

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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CO-VEST CORP., a Utah Corporation :  
Plaintiff - Respondent :  
vs : No: 19334  
BOYD CORBETT and KEITH GURR :  
dba UTAH RANCLANDS :  
Defendants - Appellants :

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APPELLANT'S BRIEF

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Appeal from Ruling of the  
Fourth Judicial District Court  
in and for Utah county, State of Utah  
Honorable George E. Ballif, Judge

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**FILED**

OCT 26 1983

Clk. Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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CO-VEST CORP., a Utah Corporation  
Plaintiff - Respondent  
vs  
BOYD CORBETT and KEITH GURR  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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Plaintiff - Respondent :  
vs : No: 19334  
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dba UTAH RANCLANDS :  
Defendants - Appellants :

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APPELLANT'S BRIEF

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NATURE OF CASE

The Defendants appeal from a ruling of the Fourth Judicial District Court, wherein it was held that an agreement was intended to have been a receipt rather than a compromise and settlement of an earlier judgment awarded to the Plaintiff.

DISPOSITION OF THE LOWER COURT

The Defendants filed a Motion for Stay of Execution and Relief of Judgment and Notice of Hearing. A hearing was held before the Honorable George E. Ballif, Judge in the Fourth Judicial District Court of Utah County, State of Utah. The lower court reviewed an instrument which was drafted by the Plaintiff's attorney and signed by both parties. The lower court also listened

to testimony offered by Defendant, Keith Gurr. The Plaintiff presented no evidence at the hearing, but relied on affidavits of its attorneys which had earlier been filed with the court. After reviewing the evidence, the lower court ruled that the instrument was not prepared for the purpose of effecting a compromise and settlement of the judgment of Plaintiff, but was a receipt of monies received and a notation of a representation that certain other monies were coming in the future.

#### RELIEF SOUGHT ON APPEAL

Defendants seek to have the ruling reversed so as to allow the intent of the parties at the time the instrument was drafted to prevail. The Defendants' tendered performance will therefore fully and finally settle this matter.

#### STATEMENT OF THE CASE

The matter in controversy revolves around an agreement to release the Defendants from a judgment awarded earlier to the Plaintiff. The Defendants had been subject to an action brought by the Plaintiff, Co-Vest Corp.. The judgment resulting from this action awarded the Plaintiff with \$35,000.00 which reflected an earlier payment of \$10,000.00 by the Defendants. Included in the awarded judgment was pre-judgment interest even though the Findings of Fact and Conclusions of Law omitted any mention of such an award. The pre-judgment interest amounted to \$7,025.00. Although not in issue on this Appeal, this discrepancy served as part of the basis for the agreement which is at issue. Record at 24.

On December 31, 1981, subsequent to the judgment and prior to the agreement at issue on this Appeal, the parties attorneys entered into a settlement stipulation whereby the Defendants were to initially pay \$15,000.00 towards the judgment with the remainder plus interest, due and payable on January 1, 1983. Record at 14. Upon receiving the final payment, the Plaintiff was to file with the court a Satisfaction of Judgment. While there remained some question as to the authority of Defendants' attorney to enter into such an agreement, on January 20, 1982, Defendants paid Plaintiff \$15,000.00. Record at 14. Due to a mistake in information received by Defendant Keith Gurr regarding the tendering of a diamond by Defendant Boyd Corbett for final payment, there was no payment made on January 1, 1983. Record at 5. Plaintiff therefore sought to enforce settlement of the Judgment by initiating a Sheriff's Sale of Defendant Keith Gurr's property. Record at 3.

In order to terminate the Sheriff's Sale and to cause the Judgment to be fully satisfied as the settlement agreement previously required, an agreement was entered into on February 28, 1983. Record at 16. This agreement, the agreement at issue in this Appeal, was put in writing after the Defendant, Keith Gurr, visited with Plaintiff's attorney. Defendants did not have counsel present. The Plaintiff's attorney drafted the document and along with the Defendant, Keith Gurr, accepted the document by causing his signature to be placed thereon. Record at 7. This instrument was entered as Defendants' Exhibit No. 1.

The agreement provided that \$20,000.00 be paid immediately while the Sheriff's Sale would be terminated. It further provided

that \$10,000.00 would be paid subsequent to the release of certain properties within the next few days. The releasing of the properties was necessary to allow the Defendants to close a sale on the properties and thereby make the final payments to the Plaintiff. Record at 8 and 15. The agreement finally provided that with the final payment of \$5,000.00, to be paid within 45 days, there was to be acknowledged a "full and final settlement". Record at 8.

Defendants paid the \$20,000.00 while Plaintiff terminated the Sheriff's Sale and thereafter released the certain properties. Defendants subsequently closed the sale of the released properties and on March 9, 1983, obtained a cashier's check in the amount of \$15,000.00 made payable to Plaintiff's attorney. Record at 10. This check was taken by the Defendant, Keith Gurr, to his attorney to make sure the matter was closed. Defendants' attorney contacted Plaintiff's attorney with the final payment. Payment was refused. Record at 11. The \$15,000.00 was subsequently placed with the court. Record at 11.

The Plaintiff again proceeded with the Sheriff's Sale. Defendants thereafter filed their Motion for Stay of Execution and Relief from Judgment and Notice of Hearing. The Defendants contended that the agreement amounted to an accord and satisfaction. Record at 3. The Plaintiff countered by claiming, in it's Affidavits, that a mistake was made in the figures represented. The mistake resulted because only a cursory examination of the Plaintiff's file was made at the time the agreement was drafted. Record at 28. The Plaintiff further contended that there had been no satisfaction. Record at 29.

ARGUMENT

POINT I

DEFENDANTS EXHIBIT NO. 1 WITH ITS  
SURROUNDING CIRCUMSTANCES, CLEARLY  
ESTABLISHES AN ACCORD AND SATISFACTION

The lower court ruled that the Defendants' Exhibit No. 1, was not prepared for the purpose of effecting an accord and satisfaction of the judgment of the Plaintiff in this matter. In so ruling, the lower court has disregarded previous decisions made by this court.

In Sugarhouse Finance Co. v. Anderson, 610 P2d 1369 (Utah 1980), this court ruled that an accord and satisfaction was enforceable in a factual pattern very similar to the case on appeal. A judgment debtor was seeking relief from a judgment which had been awarded to the judgment creditor two years earlier. The relief sought by the judgment debtor was based on an agreement reached by the parties wherein the judgment creditor would receive a sum less than the total amount, in full satisfaction of the judgment. The judgment creditor later claimed the agreement to be invalid. The court, finding the agreement to be valid, 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;
4. A consideration given for the accord.

While it was the element of consideration which the judgment creditor claimed was lacking, the courts approach offers insight as to how agreements which compromise original claims are looked upon

by the majority of Courts. In determining that there was consideration present, the court noted that wherever possible such agreements should be upheld. This, according to the court, has been the modern trend.

Although courts look upon such agreements with favor, to establish the existence of the element of assent, it must clearly appear to the court that the parties so understood and entered into a new and substituted agreement. Messek v. PHD Trucking Service, Inc., 615 P2d 1276 (Utah 1980), Tates, Inc. v. Little America Refining Co., 535 P2d 1228. In Tates, the court was faced with three propositions put forward to show there was assent: a conversation, a letter, and the cashing of a check. Because of the lack of any definite agreement, expressed or inferred, in any of the communications, the court found that there was no clear assent. The court thought it significant that words equivalent to "payment in full" were not used in the communications.

In the present case, Defendant's Exhibit No. 1, was presented to the lower court to show that a definite agreement had been reached by the parties. This agreement, at least in part, was executory in nature. The final \$15,000.00 was promised to be paid upon the release of certain properties and the acknowledgment that there was a "full and final settlement". The promise to pay the \$15,000.00 in exchange for the promise to acknowledge a full and final satisfaction was the Defendants' offer. The Plaintiff's signature was the acceptance of that offer. The language of the instrument is clear and unambiguous. It clearly shows that an agreement to settle the matter had been reached by the parties.

The assent of the Plaintiff is made even more clear by the surrounding circumstances before and at the time the document was drafted. The agreement was drafted in the Plaintiff's attorney's office by that attorney. The language used reflected Defendants' offer clearly and if the Plaintiff's attorney did not intend to accept such an offer, he would not have signed the document. He clearly would have avoided using language such as "full and final settlement". Furthermore, the use of such language is a significant factor which the lower court should have placed more weight upon.

The circumstances prior to the drafting of the instrument clearly infer that the intent of the meeting which led to the drafting of the instrument was to effect a final settlement of the matter. This agreement, while based on the earlier judgment, resulted from a settlement stipulation wherein Defendants' attorney promised that the judgment would be paid in full as of January 1, 1983. When the settlement stipulation was not met, the Plaintiff sought to enforce it through a Sheriff's Sale. It is clear from these surrounding facts that the Plaintiff intended a settlement of the matter as much as did the Defendant.

Given the clear language of the agreement with its signatures and given the surrounding circumstances, it is clearly apparent that the parties so understood and entered into a new and substitute agreement.

#### POINT II

THE PLAINTIFF'S AVOIDANCE OF  
THE ACCORD AND SATISFACTION  
WAS NOT ESTABLISHED BY CLEAR  
AND CONVINCING EVIDENCE.

While the Defendants clearly established an accord and satisfaction, the Plaintiff failed to avoid the Defendants' contentions by clear and convincing evidence. It was stated in Reliable Furniture Co. v. American Home Assurance Co., 24 Utah 2d 93, 466 P2d 368, at 369 (1970), that:

"Where a person (the Plaintiff) has in writing accepted a settlement of a disputed claim the effect is an accord and satisfaction, the avoidance of which requires clear and convincing evidence."

The Plaintiff's avoidance of the accord and satisfaction is based on the mistake of the Plaintiff's attorney as to the amount left owing. The figure of \$35,000.00 in the agreement, according to the Plaintiff's Affidavit, was in error as it resulted from a cursory examination of the Plaintiff's file. There was no other evidence offered at the hearing to support Plaintiff's contention of mistake. The most that the Plaintiff's avoidance does, is to raise the question of whether there was assent. Plaintiff's contentions are not supported by evidence which is clear and convincing. Therefore, the lower court erred by allowing the Plaintiff to avoid the accord it had worked out with the Defendant.

### POINT III

THE LOWER COURT IMPROPERLY  
CONSTRUED THE TERMS OF THE  
AGREEMENT.

The lower court improperly construed the terms of the executory accord in at least two ways. First, it allowed extrinsic evidence to be considered when the instrument was clear and unambiguous.



Second, when it allowed extrinsic evidence to interpret the contract, it failed to interpret the terms strictly against the Plaintiff, who, through its attorney, drafted the agreement.

An executory accord has been defined as an agreement that an existing claim shall be discharged in the future by the rendition of a substituted performance. Lawrence Construction Co. v. Holmquist, 642 P2d 382, (Utah 1982). In Lawrence the court further stated:

"In our view, the prior agreement was an executory accord and as such constitute, a valid enforceable contract. An accord is an agreement between the parties, one to give or perform, the other to receive or accept, such offered payment or performance in satisfaction of a claim."

As the executory accord becomes a valid enforceable contract, it becomes subject to basic contract principles. These principles require that the intent of the parties should first be ascertained from the four corners of the instrument itself. Only if the instrument is unclear or ambiguous should extrinsic evidence be allowed. And even then, only if the ambiguity cannot be reconciled from a reasonable interpretation. Continental Bank and Trust Co. v. Bybee, \_\_\_ Utah 2d \_\_\_, 306 P2d 773, (1957). The purpose is to protect the sanctity of the writing. Utah Valley Bank v. Tanner, 616 P2d 1060, (Utah 1981).

This basic rule should have been followed by the lower court. The instrument was clear and any ambiguity which may have existed could have reasonably been resolved from a reasonable interpretation of the terms used, such as "full and final satisfaction".

Even if there was ambiguity in the instrument that could not be reasonably reconciled, the lower court erred by its failure to strictly construe the language of the instrument against the Plaintiff. In Continental, supra, one of the parties who was an attorney drafted the agreement. As the party was the draftsman and an attorney, the court held that the proper construction of the instrument should be strictly against him.

In the present case, the Plaintiff's attorney is the one who drafted the instrument. Any construction of the instrument should be strictly construed against the Plaintiff.

#### POINT IV

#### PLAINTIFF SHOULD BE ESTOPPED FROM DENYING SATISFACTION OF THE DEFENDANT

In Sugarhouse Finance Co. v. Anderson, 610 P2d 1369 (Utah 1980), the court stated:

"We note, in addition, that this jurisdiction recognizes the doctrine of promissory estoppel, whereby an individual who has made a promise which the individual should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is estopped to deny or repudiate the promise should the promise or some third party suffer detriment thereby."

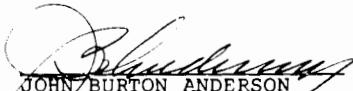
Part of the reason for the agreement in question was to allow certain properties of the Defendants to be released from Plaintiff's lien. Upon the release of the properties, Defendants would then effect their sale to a third party buyer. From those proceeds,

Defendants could then make a final settlement of the matter. The initial payment of \$20,000.00 made at the time of the agreement came with the understanding of the Plaintiff that the payment was possible only if the properties were released. It was further known by the Plaintiff that the release of the properties and their subsequent sale would allow the Defendants to pay an additional and final \$15,000.00. Plaintiff by its actions, reasonably expected to induce the Defendant to pay \$25,000.00 within a short period of time; \$20,000.00 immediately, \$10,000.00 in "a few days", and an additional \$5,000.00 within 45 days. Because of Plaintiff's initial inducements to settle the matter, the Defendant paid \$20,000.00 immediately and negotiated the sale of the released properties. Defendant therefore has suffered detriment for the benefit of the Plaintiff. As a result, the Plaintiff should be estopped from denying the Defendants satisfaction of the accord.

CONCLUSION

The ruling made by the lower court should be reversed.

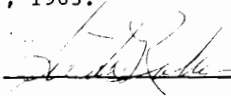
Respectfully Submitted,

  
JOHN BURTON ANDERSON  
Attorney for Defendants - Appellants

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing APPELLANT'S BRIEF was mailed, postage pre-paid, to Stephen F. Hutchinson, Attorney for Plaintiff - Respondent, at 600 Commerical Club Building, Salt Lake City, Utah 84111.

DATED this 25<sup>th</sup> day of October, 1983.

  
\_\_\_\_\_