1984

Floyd Webster v. Mary Lehmer And Charles Lehmer : Opening Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

FLOYD WEBSTER,

Plaintiff-Respondent,

vs.

MARY LEHMER and CHARLES LEHMER,

Defendants-Appellants.

Appeal No. 19339

OPENING BRIEF OF APPELLANTS

On Appeal from the District Court
of Summit County
HONORABLE J. DENNIS FREDERICK, District Judge

ROBERT S. CAMPBELL, JR.
E. BARNEY GESAS
of
WATKISS & CAMPBELL
310 South Main St.
Salt Lake City, Utah

Attorneys for Appellants
Mary Lehmer and Charles Lehmer

JAMES J. SMEDLEY, ESQ.
30 North Main St., #3
Weber City, Utah 84032

Attorney for Respondent

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IN THE SUPREME COURT

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FLOYD WEBSTER,	)	
Plaintiff-Respondent,	)	
vs.	)	Appeal No. 19339
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Defendant-Appellants.	)	

OPENING BRIEF OF APPELLANTS

LISTING OF ALL PARTIES TO THE APPEAL

The parties to this appeal are:

Mary Lehmer, 570 Deer Valley Road, Park City, Utah, 84060

Floyd Webster, 95 North 3rd West, Heber City, Utah, 84032

Charles Lehmer died during the course of this litigation and Mary Lehmer, John Lehmer, and Susi Lehmer Kontgis, the lawful heirs of the decedent, succeeded to all of his rights, title and interest.

NATURE OF THE CASE

Plaintiff/Respondent Floyd Webster ("Webster") seeks rescission of a contract for the sale of his interest in a house and land in Park City, Utah and Defendants/Appellants

Mary and Charles Lehmer ("Lehmers"), in a counterclaim, prayed for specific performance of the contract.

DISPOSITION OF THE CASE IN LOWER COURT

Webster commenced this action in the District Court for Summit County, Utah on July 14, 1981 seeking rescission of the sale of any interest he had in the house and land in Park City, Utah. The complaint alleged, in seven causes of action, vagueness and ambiguity of the agreement, insufficient consideration, violation of the statute of frauds, no meeting of the minds, misrepresentation, breach of fiduciary duty, and breach of the contract. (R.1).[1/] Lehmers answered the complaint and counterclaimed, seeking specific performance of the agreement. (R.7) After discovery and before trial, Webster filed an amended complaint asserting additional grounds for rescission of the contract, including mutual and unilateral mistake of fact, undue influence and breach of trust and confidence in the formation and execution of the agreement. (R.175, 179, 199).

At the conclusion of the trial to the court, conducted on January 18th through 20, 1983, the court announced its ruling in favor of Webster. (T.414-419). The district court

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[1/] References are to the Trial Transcript ("T"), the designated record from the District Court file ("R").

entered judgment (R.367-369) and made its initial findings of fact and conclusions of law on April 18, 1983 (R.360-366) and made amended findings of fact and conclusions of law on June 15, 1983. (R.491-499). On June 15, 1983 the Court also denied Lehmers' motion to amend the findings of fact and conclusions of law or, alternatively, to grant a new trial. (R.489-490).

The amended findings of fact and conclusions of law and order denying Lehmers' motions were filed on June 29, 1983. (R.493). The district court's judgment granted Webster's requested relief of rescission of the real estate agreement.

RELIEF SOUGHT ON APPEAL

Lehmers seek reversal of the district court's order of rescission dated April 18, 1983 of the real estate contract by reason of prejudicial errors of law. This Court should remit the case to the district court with directions to enter an order of specific performance of the real estate contract in favor of Lehmers or, alternatively, order a new trial on Lehmers' entitlement to specific performance, all in accordance with the opinion of this Court.

ISSUES PRESENTED ON APPEAL

1. Did the district court err in denying Lehmers' motion in limine and in receiving at trial testimony regarding

the fair market value of the undivided fee simple interest in the subject property, when Webster only owned and sold the Lehmers squatter's rights in the building improvements on the premises?

2. Did the district court err in concluding that Webster had proven either a legally adequate mutual or unilateral mistake of fact sufficient to permit rescission of the agreement?

3. Did Webster fail to prove and did the district court err in ruling that Webster lacked mental capacity and was incapable of understanding the agreement?

4. Did the district court err in concluding that there existed a confidential relationship between the Lehmers and Webster such that a duty is due Webster by Lehmers in the real estate transaction?

5. Did the district court err in concluding that the confidential relationship existed between the Lehmers and Webster such that Webster was subject to the undue influence of the Lehmers?

6. Did the district court err in refusing to grant Lehmers' claim for specific performance of the agreement?

STATEMENT OF THE FACTS

1. The Parties and The Squatter's Rights.

Appellants Mary and Charles Lehmer at all relevant times lived on what had been known as Heber Avenue, and what

is now known as Deer Valley Road, in Park City, Utah. (T.138-139, 222; Lehmer 5/4/82 depo. p. 7).[2] Mary Lehmer is a retired lawyer who practiced many years primarily in the area of family law with some experience in real estate matters. (T.222; Lehmer 5/4/82 depo. pp. 25-26). Mr. Webster is a retired miner and mechanic who has lived, with some interruptions, for approximately forty years in a house on a piece of property located on Deer Valley Road in Park City, Utah. (T.95-96, 103; Webster 1/7/83 depo. pp. 7-9). Webster, together with his late wife, on May 3, 1948, acquired a possessory right and interest in a four room frame dwelling house in Park City, Summit County, Utah by Quit Claim Deed (the "squatter's rights). (T.95; Ex. 10.).[3] In 1948 and continuing thereafter, the underlying fee simple interest and ownership of the subject property were held in independent ownership. (T.55). The title to the real property on which Lehmers and Webster lived in Park City was originally owned by United Park City Mining Company and in 1971 was sold to Royal Street Land Company. (T.55).

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[2] The depositions of Floyd Webster of May 4, 1982 and January 7, 1983, as well as the May 4, 1982 deposition of Mary Lehmer were all, upon motion, published before and used by the trial court as evidence under Rule 32(a), Utah Rules of Civil Procedure. (T. 238, 419; R. 301).

[3] All exhibit references are to the trial exhibits which, whether offered by Webster or Lehmers, were numbered consecutively. (R.313, 314).

Webster, in the course of his employment for the mining company and subsequent to his retirement from that position, worked as a mechanic on sophisticated mining machinery, on equipment owned by Park City and on machinery and vehicles for various other individuals. (T. 104-106, 136-137). In conjunction with this mechanical work, Webster used and understood technical manuals and printed materials concerning the machinery and vehicles on which he worked. (T.137; Webster 1/7/83 depo. pp. 57-58).

2. The Relationship Between Webster and Lehmers.

Webster and Lehmers were neighbors in Park City from 1972 to 1980 and on occasion would see each other when passing in the neighborhood. (T.138-142; Webster 1/7/83 depo. pp. 107-108). Lehmers and Webster and his wife, who died in 1975, did not socialize together and except for one occasion, were not guests in the others home. (T.112, 139-140; Webster 1/7/ depo. p. 108). Although Webster trusted the Lehmers, he was not under the influence of or dominated by the Lehmers during October through December, 1980 or at any other time. (T.168-169). Webster had never relied upon the Lehmers for business advice or the conduct of his day to day affairs and Webster was capable of making his own independent decisions regarding business matters and entering into contracts. (T.169-170; Webster 1/7/83 depo. pp. 106-108).

During the course of their acquaintance, Webster had done occasional odd jobs for Lehmers, such as helping with minor repairs on their house and automobiles, for which Lehmers gave him some small compensation. (T.110-111, 252-253; Webster 1/7/83 depo. pp. 17-20).

3. Formation of the Contract.

On October 7, 1980, the Lehmers happened to see Webster in the neighborhood and invited him to come into their home to discuss Webster's "squatter's rights" on the subject property on Deer Valley Road. At the time, Webster was unmarried, his wife having earlier died in 1975. The Lehmers inquired of Webster if he would be interested in selling his squatter's interest subject to his right to remain permanently on the property for the balance of his life for $5,000.00. (T. 101-102, 167-168). Without extended discussion, and without any representations on the part of the Lehmers as to the value, title or quality of the squatter's rights which Webster owned, Webster accepted the offer to purchase subject to the right of Webster to live on the property, personally, as long as he desired. (T. 101-102, 169-170, 175; Webster 5/4/82 depo. p. 26).

Mary Lehmer wrote out in longhand a contract of sale of Webster's squatter's rights which, prior to signing, was read and understood by Webster and the Lehmers.[4/]

[4/] T. 170-174; Webster 5/4/82 depo. pp. 23, 24, 30, 35; Lehmer 5/4/82 depo. pp. 37,39,42; Ex. 11.

In late October 1980, Webster decided to move from the subject property and live with his former neighbor, Mary Dudley, in Heber City, Utah. (T. 283-284). Webster advised Lehmers of that intention and by the end of November 1980, Webster had voluntarily removed himself from the subject property. Because of that fact and in further consideration of the Lehmers agreeing to pay delinquent public utility and sanitary fees, as well as unpaid taxes and attorney's fees on Webster's squatter's rights, the Lehmers and Webster entered into an amended agreement of sale on December 21, 1980 wherein Webster agreed to surrender and release his tenancy of the subject property which had been reserved in the original agreement. (T. 128-133; Ex. 12).

Under the terms of the real estate agreement, the Lehmers were to arrange for a survey of the property and prepare a quitclaim deed based on the survey. In mid October 1980, Mrs. Lehmer retained an engineer to prepare and certify the required survey. The survey took several months to complete. (T. 180, 293-294).

On numerous occasions between October 7 and the end of December 1980, Webster specifically and unequivocally ratified and implemented the agreement of sale with Lehmers by:

- requesting of and receiving from Lehmers $100.00 cash toward the purchase price on

two occasions in October of 1980; (T. 125, 126, 179);

- requesting of and receiving from Lehmer $500.00 cash toward the purchase price in November of 1980. (T. 126, 179, 183);
- requesting of and receiving from Lehmers 200.00 cash toward the purchase price on December 21, 1980. (T. 181, 183);
- signed an affidavit on December 21, 1980, prepared by the Lehmers to terminate what was believed to be his deceased wife's joint tenancy in the property. (T. 132-33, Ex. 13);
- gave Lehmers a key to the house located on the subject property. (T. 187);
- removed his personal possessions from the house and moved in with Mary Dudley in Heber City. (T. 187; Webster 5/4/82 depo. pp. 67-71).

In additional furtherance and implementation of the agreement, the Lehmers obtained the survey on the property, paid for the same and paid the public utilities and sanitary fees. (T. 293-295, 298-299). Lehmers prepared a quitclaim deed to Webster's squatter's rights and, in January 1981, Mary Lehmer spoke with Webster by telephone to arrange a date for final closing, payment of the balance due under the contract

of sale and execution of the quitclaim deed. Webster orally reaffirmed the contract and it was agreed that the parties would set a convenient date, after Mrs. Lehmer recovered from an illness, for the final closing. (T. 293-294).

In early February 1981, Lehmers sent to Webster in a negotiable draft for $1,100.00 in further part payment of the purchase price and thereupon attempted to arrange with Webster a date for closing on the property. Webster accepted the draft but did not negotiate it.[5/]

4. The Royal Street Land Company.

On October 7, 1980, the underlying fee interest in the subject property was owned by Royal Street Land Company, a real estate development company and the Park City ski resort operator. (T. 45-46, 55). Title to the fee simple interest of the underlying ground on the squatter's rights of Webster could have been reasonably ascertained by a review of the record title in the office of the county recorder for Summit County, in Coalville, Utah. (Webster 1/7/83 depo. pp. 94-97).

At the time of the execution of the October 7, 1980 agreement between Webster and the Lehmers, Royal Street had developed an "informal" and ad hoc policy of selling the

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5/ T. 292-293, 299-300; Webster 5/4/82 depo. pp. 72-74, 82-84; Lehmer 5/4/82 depo. p. 35.

underlying title to Deer Valley "squatters" for 50 cents a square foot (T. 57). The policy was not only undeclared and unpublished, it was not generally disseminated in the Park City area. (T. 56-57). The testimony is absolutely clear that the Lehmers were not aware of any informal or ad hoc policy of Royal Street between October and December 1980. (T. 268-269, 286-287).

To the contrary, Mary Lehmer had chatted with neighbors in the Deer Valley area in casual conversation, and had suggested that should Royal Street attempt to evict any of the "squatters" from their land, all of the squatters and others similarly situated should join together, retain an attorney and fight Royal Street. (T. 236-241, 301).

On the other hand, Webster had been told by a neighbor, Neil Clegg, prior to October 1980, that Royal Street might have an informal policy in which the underlying fee title could be acquired and that Webster should check with Royal Street to determine whether that policy would apply to his squatter's interest. (T. 324-331). Similar information was given to Webster by Alma Pedersen, a co-worker for Park City, long before October 1980. (Webster 1/7/83 depo. p. 66). Webster made no attempt to take Clegg's advice or to otherwise ascertain the underlying fee title. (T. 147-150).

5. Webster's Lack of Concern Regarding the Underlying Fee Title to his Squatter's Interest.

From the time that Webster first acquired his squatter's interest in 1948, he knew he did not own the underlying property. (Webster 1/7/83 depo p. 42). Yet, he neither had any desire to nor did he attempt to ascertain the title of the underlying fee simple of the ground where his home was situated. He made no inquiry at any time on the subject. (T. 147-150).

Although Webster claimed, only after amending his complaint, that as of October 7, 1980, he believed the underlying fee of his squatter's property was owned by the by the U. S. Bureau of Land Management (BLM), the undisputed and pivotal fact is that it did not make any difference to Webster who was the owner of the underlying fee as of October 7, 1980 -- he would have still, at that time, sold his property to the Lehmers for $5,000.00. (Webster 1/7/83 depo. p. 72). Webster stated on the witness stand:

"Q Now, with regard to whether the ground surrounding your property was owned by the BLM or by Royal Street, it didn't make any difference to you, did it, at the time you sold the property to Mrs. Lehmer?

A No, it didn't.

Q In other words, whether the BLM owned it or whether Royal Street owned it, you would have sold it to Mrs. Lehmer for $5,000; isn't that right?

A Yes."

(T. 147-148).

On redirect examination by his own counsel, Webster again reaffirmed his testimony that regardless of the underlying ownership of the property in Royal Street or in the BLM, he would have still sold his squatter's rights to the property for $5,000.00. (T. 195). Webster stated that in October 1980 he believed $5,000.00 was a fair value to pay for his squatter's rights. (T. 179).

The Lehmers did not cause Webster to believe that his home was situated on BLM ground. (T. 155). Lehmers made no representations or statements to Webster, directly or indirectly, with regard to the title of the underlying fee to Webster's surface interest. (T. 101-102, 169-170, 175). Webster never advised the Lehmers that he thought his home was on BLM ground. (T. 163, 169-170).

6. The Mental Capacity of Webster.

The record at trial is clear that Webster was a man of at least reasonable if not above average intelligence, that he knew and understood the consequences of his agreement to sell the squatter's rights to the Lehmers, that he intended to sell those rights on October 7, 1980, that he believed at that

time $5,000.00 to be a fair price for his squatter's interest, and that he was not under any disability as of that date. (T. 143-144, 171-172, 179, 184).

Yet, Webster claimed at trial that he was a drunk, an alcoholic, and that he was depressed because of the death of his wife. His wife had died more than five years before the date of the conveyance. While he did drink wine, he was not under the influence of alcohol at the time of the agreement, he had never required medical help for any drinking problem, and he was in full control of his faculties and actions in October, November and December of 1980. (T. 142-144; Webster 1/7/83 depo. p. 24). Indeed, Webster made a conscious decision to move from the subject premises to Heber City in order to begin living with the former neighbor of he and his wife, Mary Dudley. (T. 181, 283-284). While Webster's driver's license had been revoked in 1979 for driving under the influence, Webster had never thereafter attempted to reapply or obtain another license. (Webster 1/7/83 depo. p. 24).

The Lehmers were not aware of any claimed alcoholic problem of Webster; they only knew that he took a social drink as did others in the community. (Webster 1/7/83 depo. pp. 26-27).

There is no testimony that in October 1980 Webster was incapable of handling or administering his affairs, of comprehending the reasonable consequences of his conduct, or

of being unable to comprehend the value of his squatter's rights. Webster had been accustomed to entering into contracts for the sale of automobiles, appliances and other chattels, he readily understood complex mechanical manuals and he read the daily newspaper. (T. 136-138). At the trial, he did have a stutter and a halting gate in his speech. (T. 135). When asked by his counsel to read from the written contract of October 7, 1970, Webster read the words out loud to the court, tripping over some vowels and larger words as he went. However, he gave a reasonable clear definition of the terms and comprehension of the condition of sale. (T. 170-172).

7. Belief of the Parties as to Ownership and Value of the Squatter's Rights.

In October 1980, Webster and the Lehmers were of the understanding that the squatter's rights of Webster were held by him and his late wife as joint tenants. (T. 178-179, 225-226, 233). In fact, that was the view of Webster at the time when the complaint was filed in July 1981. In an amended complaint, Webster claimed the property was held between himself and his wife as tenants in common and that his daughters were, therefore, entitled to an interest in the property because his wife had died intestate. (R. 181). At trial, the Lehmers acknowledged that if Webster was not the surviving joint tenant, he could only be ordered by specific performance to convey the interest which he agreed to "quitclaim" to the

Lehmers, namely, an undivided 1/2 interest as a tenant in common plus an undivided 1/3 of his deceased wife's 1/2 interest. (T. 304).

There were no representations, statements, or opinions expressed, made, or uttered, directly or indirectly, by the Lehmers to Webster on or about October 7, 1980, with regard to the value of Webster's squatter's interest in the property. (T. 101-102, 169-170, 175; Webster 5/4/82 depo. p. 26). At the date of the transaction, the Lehmers believed that the fair market value of Webster's squatter's rights was not more than $5,000.00. (T. 255-256). Webster was in agreement. (T. 179).

8. Testimony on the Fair Market Value on the Undivided Fee Simple Estate.

The only testimony offered at trial as to the fair market value of the squatter's rights sold by Webster to the Lehmers on October 7, 1980, as amended on December 20, 1980, was that of the Lehmers, viz., "between $1500.00 to $5,000.00." (T. 348, 355-360). That estimated value was submitted by J. Brown, a certified appraiser. (T. 340). Brown testified that squatter's rights, per se, could not be evaluated as if the property were owned in fee simple, for the latter carried with it the total bundle of rights in perpetuity, while squatter's rights were limited to the economic utility and life of the house and the use of the surface in connection with the house.

Brown testified that the highest and best use of the squatter's rights was not for condominium or high density, new residential use, as the owner was not entitled to legally place the property to such use. (T. 353-354, 361).

By a motion in limine, the Lehmers requested that the district court exclude any evidence and expert testimony as to the fair market value of Webster's squatter's rights (R. 271-272) on the theory that such testimony was irrelevant to the issues before the court. The district court denied the motion in limine and over the continuing objection of the Lehmers, permitted the testimony of a real estate salesman, L. Pia, as to the fair market value of the entire undivided fee simple as of October 1980. (T. 65, 68, 77-78). Pia testified that as of that date, the highest and best use of the Webster squatter's rights was for condominium development and that the squatter's rights would have sold on the market for between $240,000.00 and $400,000.00 (T. 69, 83).

Pia had no comparable sales of any squatter's rights having been sold for a per acre or per square foot price that would begin to approach such values. Indeed, Pia was not aware of a sale or even an offer to sell any squatter's rights at all. (T. 91). The district court did not explain the rationale of its ruling admitting testimony of the fair market value of the undivided fee simple to prove the value of Webster's squatter's rights. (T. 68-69).

9. Attempted Rescission by Webster.

After Webster had signed the contract, had requested part performance by Lehmers of the purchase price, and during his occupancy of the house in November 1980, Webster had a conversation with a friend and businessman, John Fritch, who told Webster that he probably had sold his squatter's interest to the Lehmers for an inadequate sum. (T. 210-217). Following such meeting, Webster engaged in further actions of part performance of the contract and requested further performance on the part of the Lehmers without attempting to avoid or disavow in the least the agreement of October 7, 1980. (T. 187-189).

In February of 1981, Webster notified Lehmers that he intended to rescind the original and modified agreement because he believed he had not received enough money for it. (T. 300-302; Ex. 23, Ex. 24). Lehmers rejected Webster's attempt at rescission and in early February of 1981 advised Webster that they were prepared to tender to Webster the full amount due under the terms of the agreement. (T. 299). Lehmers remain prepared to tender full payment and complete the contract. (T. 303).

10. The District Court's Amended Findings of Fact and Conclusions of Law:

The following is a summary of the findings of conclusions entered by the district court and which were not supported by competent evidence and are contrary to the law.

FINDINGS OF FACT

(1) Finding of Fact 2. Webster trusted the Lenmers and placed confidence in them to the extent that he felt that that confidence would not be abused. (R. 494).

(2) Finding of Fact 3. After the death of his wife in 1975, Webster, through the time of the transaction, became despondent and depressed to the extent that his affairs suffered and he had a severe drinking problem. (R. 494).

(3) Finding of Fact 5. Webster has an obvious lack of mental capacity or training to independently understand the effect of the subject transaction (R. 495).

(4) Finding of Fact 8. Webster believed on October 7, 1980 and continued to believe through February 18, 1981 that the subject property was owned by BLM; yet, significantly, no discussion regarding fee ownership ensued during the contract negotiations. (R. 496).

(5) Finding of Fact 9. The property had a "potential" fair market value at the time of the transaction to Webster of $240,000.00 to $400,000.00, which he contracted away for $5,000.00. (R. 496).

(6) Finding of Fact 10. Webster would not have sold the subject property for the $5,000.00 sum had he known it was not on BLM land. The mining company (Royal Street) would have sold him fee title for 50 cents a square foot. (R. 496).

B. CONCLUSIONS OF LAW

(1) Conclusion of Law 1. There existed grossly disparate sophistication regarding financial and real estate matters to the extent that the subject transaction was not considered by the court to be at arm's length. (R. 497).

(2) Conclusion of Law 2. Webster was not guilty of negligence in not being aware of fee ownership nor was his unawareness the result of an inexcusable lack of due care. (R. 497).

(3) Conclusion of Law 4. There existed a unilateral mistake of fact on the part of Webster regarding ownership of the property sufficient to warrant rescission. The unilateral mistake of fact specifically related to a material feature of the contract, i.e. the purchase price and under such circumstances Webster did not act negligently. (R. 498).

(4) Conclusion of Law 5. There existed a confidential relationship between Webster and the Lehmers based upon trust and friendship developed over a period of years which was abused and this constituted grounds for rescission. The subject transaction was the result of undue influence exercised by Lehmers over Webster. (R. 498)

(5) Conclusion of Law 6. There existed a mutual mistake of fact regardin he parties' belief with respect to title of the subject property being held in joint

tenancy rather than tenancy in common. Such mutual mistake of fact constitutes a basis for rescission. (R. 498-99)

A R G U M E N T

POINT I

THE DISTRICT COURT PREJUDICIALLY ERRED IN DENYING THE LEHMER MOTION IN LIMINE AND IN ADMITTING EXPERT TESTIMONY ON THE FAIR MARKET VALUE OF THE UNDIVIDED FEE SIMPLE ESTATE.

Prior to commencement of trial, Lehmers filed a motion in limine to exclude from evidence testimony relating to the value of the squatter's right sold by Webster. The bases of the motion were that the executed contract specified the purchase price, that Webster sought only rescission because of mistake and did not claim that Lehmers had fraudulently misrepresented the value of the property, that the $5,000.00 purchase price was, in law, adequate consideration, and that the question of the value of the squatter's rights was, therefore, legally irrelevant. (R. 271-272). The motion was denied without prejudice to renew the same at the time of trial. (R. 301).

While it was error for the district court to deny the motion in limine, the most conspicuous error occurred when the

trial unfolded and Webster attempted to introduce evidence as to the fair market value of the undivided fee simple estate to show the value of his "squatter's rights". (T. 65). An objection was made by Lehmers to this proposed testimony on the ground that even if the court were going to consider as an issue the value of a squatter's right, the fair market value of the total undivided fee had nothing to do, whatsoever, with the evaluation of a squatter's right, that there was no foundation for such testimony, and that sales of fee simple interests in property could not, as a matter of law, be utilized as comparative data to determine the value of a squatter's right.[6/]

The district court denied the objection without elaboration and proceeded to receive all of Webster's alleged expert testimony on (1) the highest and best use of the

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6/ It was acknowledged by the parties that a squatter's right entitled the claimant to only the possessory use of the frame house and appurtenant lands for so long as the house had economic, functional utility. The quitclaim deed, by which Webster and his wife acquired their squatter's interest on May 3, 1948, described the interest to be:

> "the following described house located in Park City, Summit County, State of Utah, to-wit:
>
> > That certain Four Room frame dwelling house, being the tenth house on the South Side of U.P.R.R. Track and Heber Avenue or Deer Valley, in Park City, Summit County, State of Utah."

The wooden structure was at least 60 to 70 years old.

squatter's rights being high density condominium development, (2) sales of the undivided fee simple interest of other properties in the Deer Valley area at prices upwards of $400,000.00 and (3) the fair market value of the undivided fee simple estate, upon which Webster's squatter's rights were located, being between $240,000.00 - $400,000.00. (T. 68-75, 89-91).

1. The District Court Prejudicially Erred in Denying the Motion in Limine.

This was not a case in which the fair market value of Webster's squatter rights was in direct controversy. Webster did not establish or claim fraud, misrepresentation of or mistake as to the fair value of the squatter's rights. This was a straight-forward transaction for the purchase of the squatter's rights which Lehmers claimed was an arms length transaction. Under the ruling case law of this Court in Dalton v. Jerico, 642 P.2d 748 (Utah 1982), market value of the property is an irrelevant issue in determining the availability of the equitable remedy of rescission. Stated this Court:

> "[I]t is not for a court to rewrite a contract improvidently entered into at arm's length or to change a bargain indirectly on the basis of supposed equitable principles."
>
> 642 P.2d at 750.

See also, Park Valley Corp. v. Bagley, 635 P.2d 65 (Utah 1981).

It is true that Webster claimed that as of October [illegible], 1980, a "confidential relationship" existed between himself and Mary Lehmer. While the nature of that confidential relationship remained an undefined enigma throughout the trial, an argument could have been made that testimony on the value of the squatter's rights should be received on the limited issue of the damages that were sustained as a result of any abuse by Lehmers of the alleged relationship. But no such proffer was made, and the value testimony was admitted by the trial court on all issues in the case. Such admission was patent error.

2. The Trial Court Erred Prejudicially in Receiving Value Testimony on the Fee Simple Interest.

Even if it were argued that the opinion testimony on the value of the squatter's rights was admissible for a limited purpose, that in no way would condone what the district court permitted to take place at trial, namely, that in proving the value of the squatter's rights, testimony could be admitted as to the fair market value of the undivided fee simple estate. That fee simple estate was not sold by Webster to Lehmers and was not in any way before the court.

Yet the trial judge permitted testimony on highest and best use and the fair market value of the squatter's rights to be measured as though those rights were the equivalent of the fee simple interest. The law will not permit

property interest to be evaluated based upon a hypothetical and quantitatively larger interest than existed at the date of the transaction. State of Utah v. Tedesco, 4 U.2d 248, 291 P.2d 1028 (1956); State of Utah v. Peak, 1 U.2d 263, 265 P.2d 630 (1953); State v. Evans, 634 P.2d 845 (Wash. 1981). In Tedesco, a landowner in eminent domain claimed his unsubdivided property had a highest and best use for residential subdivision as of the date of valuation, and thereupon attempted to introduce expert testimony as to the fair market value of the property as subdivided land. This Court squarely rejected such attempt, stating that:

> It [the unsubdivided parcel] must go, to the condemnor for its fair market value as is, irrespective of any claimed value based on an aggregate of values of individual lots in a subdivision which one hopes to sell at a future time to individuals rather than to an individual. The test is not what the lots will bring when and if 62 willing buyers come along, but what the tract, as a unit, and as is, platted or not, and in whatever state of completion, will bring from a willing buyer of the whole tract." (Emphasis added)
>
> 291 P.2d at 1029-1030.

The squatter's rights were to be evaluated in the condition it was in at the time in question and not as though the squatter's rights had somehow blossomed into an undivided fee simple interest. State Road Comm. v. Valentine, 10 U.2d

132, 349 P.2d 321 (1960); U. S. v. 3.544 Acres of Land, 1[illegible] F.2d 596 (3d Cir. 1944).

The law is firmly settled in this state that in determining the value of property interest, a higher and different use of the interest may be considered if such were within the realm of probability. State Road Comm. v. Williams, 22 U.2d 301, 452 P.2d 548 (1969); State Road Comm. v. Jacobs, 16 U.2d 167, 397 P.2d 463 (1964). Thus Webster might have been able to show that the squatter's rights could have been placed to a higher and more valuable use than as a 60-70 year old deteriorated bungalow house, if the higher use were reasonably probable.[7/] But the fatal flaw in the Webster testimony and in the district court's ruling receiving that evidence is that Webster's expert, Pia, appraised the undivided fee simple interest of the underlying property as though it had already been merged, as an accomplished fact, with the squatter's rights as of the date of the transaction, October 7, 1980.

7/ Webster failed to show at trial that as of October 1980, he could or would have purchased the undivided fee interest underlying his squatter rights from Royal Street for something in the neighborhood of 50¢ per square foot. If such testimony had been presented, it would have been speculative and conjectural, Tanner v. Provo Bench Canal and Irrigation Co. 40 Utah 126, 121 Pac. 584 (1911), for the ad hoc policy of Royal Street did not and could not rise to a legally, justiciable interest. United States v. Petty, 327 U.S. 372, 380 n. 9 (1945).

To put it in a slightly different manner, Webster never offered and the district court never received any testimony from Webster as to the market value of the squatter's rights, even considering the probable highest and best use of those rights. Rather, what the district court erroneously permitted was the squatter's rights to be appraised as though it were the undivided fee simple interest. Had Webster owned the undivided fee instead of merely squatter's rights on October 7, 1980, his testimony on property value would have been no different than what he presented at trial.

The fallacy of the district court's ruling was substantially prejudicial and cannot be permitted to stand. State v. Tedesco, supra at 1030.

3. The Attempt of the District Court to Cure its Error Failed.

It is not as though the district court was unaware that it was in troubled waters under its unprecedented ruling allowing Webster's value testimony on the fee simple estate. Indeed, the court tried to avoid the palpable error by signing a finding of fact that "the property [vis-a-vis the squatter's rights] had a potential fair market value * * * of $240,000.00 to $400,000.00". Finding of Fact No. 9. The trouble with this tactic is that "potential" market value of the squatter's rights is not the test under which Webster may prevail

assuming, arguendo, that a confic ial relationship between Lehmers and Webster were otherwise established. "Potential" market value is, by definition, inherently speculative, conjectural, and involves mere possibilities. Rather, if the evidence had established a confidential relationship, the legally relevant test is the fair market value of the squatter's rights as of the date of the transaction. State v. Tedesco, supra.

4. The Only Admissible Value Testimony was that of Lehmers.

All of the Webster testimony on value, including the purported comparable sales, related only to the market value of the fee simple estate and the property underlying Webster's squatter's rights. The only competent evidence on the market value of the squatter's rights as of October 1980 came from the expert witness, Brown, for Lehmers. Based on several approaches, Brown concluded that the fair market value of the squatter's rights was between $1,500.00 and $5,000.00. (T. 348, 355-360). Brown stated that the prospects of a willing buyer of the squatter's rights being able to obtain a more substantial interest in the underlying property through the possible purchase from Royal Street was too remote and uncertain to be given credence. (T. 352-353).

Thus, even if Webster had established a confidential relationship between Lehmers and himself, the only competent

evidence establishes that the contract price of $5,000.00 was fair and at market.

POINT II

THE DISTRICT COURT PREJUDICIALLY ERRED IN CONCLUDING THAT A UNILATERAL MISTAKE OF FACT ON THE PART OF WEBSTER WAS PROVEN AND THAT RESCISSION WAS JUSTIFIED.

1. Under the Controlling Case Law, Webster Failed Absolutely to Exercise Ordinary Diligence to Discover the Truth of the Claimed Mistaken Fact.

Webster's claim that he entered into the contract of sale with Lehmer under a unilateral mistake of fact was not only flawed, but it was very late in coming. He contended that, at the time of the transaction, it was his understanding that the fee simple estate underlying his squatter's rights was owned by the Bureau of Land Management and that had he known Royal Street owned it rather than the BLM, he would not have sold to Lehmers his squatter's rights at the agreed upon price. It is noteworthy that such claim of unilateral mistake by Webster was never made until the eve of trial.

Notwithstanding the belated argument, the district court, under Conclusion of Law No. 4, determined that a unilateral mistake of fact was made by Webster which warranted rescission. That conclusion is manifest legal error and must be set aside.

In Ashworth v. Charlesworth, 231 P.2d 724 (Utah 1951) this Court stated that not only must a claim for rescission based on unilateral mistake be proven by clear and convincing evidence, but the:

> "mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake."
>
> 231 P.2d at 727.

The evidence in this case places beyond any dispute the cardinal fact that Webster never exercised any deligence, whatsoever, during more than 33 years of holding his squatter's rights, to determine the nature of the underlying fee simple interest. He never consulted a title firm or legal counsel, he did not consult the county recorder or county assessor, and he never made any attempt to speak with any officials of the BLM or United Park City Mining Company (or its successor, Royal Street). (T. 120, 133, 147-149, 161-163). He blithely assumed from a social converation in the neighborhood that because a certain individual maintained a garage on BLM land several hundred yards to the west, his squatter's home was on BLM land. (T. 118). Such conduct, or the lack thereof, by Webster, hardly constitutes the "exercise of ordinary diligence" as required by this Court's opinion in Ashworth.

In point of fact, Webster's conduct was negligent and reflected a substantial lack of diligence in discovering the

title information that was readily available to him. Webster cannot charge the consequences of his negligence to the Lehmers in claiming unilateral mistake of fact. Mikkelson v. Quail Valley Realty, 641 P.2d 124 (Utah 1982); Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah 1967).

The district court prejudicially erred in finding that the unilateral mistake of fact as to the title of the underlying fee could, under the extant circumstances, warrant rescission of the contract.

2. There was a Failure by Webster to Show Any Reliance on this Claimed Mistake of Fact.

There is an equally difficult, if not more serious hurdle facing Webster and the district court's ruling on the alleged mistake of fact. Webster testified four times on deposition and at trial without equivocation, that as of the date of the transaction it would not have made any difference to him whether his squatter's rights were situated on BLM land (as he thought) or whether he was on Royal Street property -- he would still have sold his squatter's rights to the Lehmers at that time for $5,000.00. (T. 147-148; Webster, 1/7/83 depo. pp. 72, 95, 97-99). For example, in Webster's deposition of January 7, 1983, pp. 98-99, Webster stated:

"Q. Mr. Webster, why didn't you check out ownership of your property over in Coalville at the county recorder's office before October 7th, 1980?

A. Why?

Q. Yes, sir, why didn't you?

A. I guess I didn't care.

Q. You didn't care whether it was on BLM land or not? You didn't want to check to really see if that was the truth, did you?

A. Yeah, I didn't care.

And at trial, Webster again repeated his lack of any concern as of October 1980, with regard to whether the fee simple underlying his squatter's rights was owned by the BLM or by anyone else. (T. 146-148).

Thus, if the ownership of the underlying fee was of no consequence to Webster in his sale of his squatter's rights to Lehmers and if he would, as testified, have nonetheless sold the squatter's rights to Lehmers for the stated price even if he had known that the fee was owned by Royal Street, the obvious query is how was this man prejudiced by his claimed mistake of fact? The answer is equally obvious that Webster was not prejudiced and has no standing to ask a court of equity for rescission. The district court substantially erred in ignoring the absence of any reliance by Webster on his claimed mistaken fact.

Webster failed to show by clear and convincing evidence the required basis for unilateral mistake, Hatch v. Bastian, 567 P. 2d 1100 (Utah 1977). The trial court precisely erred.

POINT III

THE DISTRICT COURT PREJUDICIALLY ERRED IN CONCLUDING THAT A MUTUAL MISTAKE OF FACT WAS SUFFICIENT TO PERMIT RESCISSION.

Under Conclusion of Law No. 6, the trial court erroneously determined that a mutual mistake of fact existed regarding the parties belief that the squatter's rights of Webster were held in joint tenancy between he and his wife when in fact, the squatter's rights were held as tenants in common. The reservoir of case law need not be exhausted to ascertain the fundamental legal error in this conclusion.

To begin with, mutual mistake of fact is generally not a basis for rescission, but for reformation, if possible, of the contract. Through that remedy, the integrity of the contract can be maintained (unless the mistake would have caused both parties not to execute the agreement) and the agreement reframed to express the true intent.

Secondly, the mistaken fact in Webster's title to his squatter's rights was one that would have injured the Lehmers only and not Webster. Webster made no warranties as to the title to his squatter's rights, Lehmers demanded none, and the Lehmers clearly bore the risk of the infirmities in the title to be conveyed by Webster. 13 Williston on Contracts §1566A p. 355. Thus, Webster cannot be heard to complain about the mutual mistake of fact because he suffered no prejudice. He

merely was placed in a position of conveying less of an interest in his squatter's rights than he had agreed to convey. Lehmers made no claim at trial that the consideration of $5,000.00 should be diminished by reason of Webster's diminishment of title. So far as Lehmers were concerned, Webster agreed to convey whatever interest, if any, he owned in the squatter's rights. Turtle Management Inc. v. Hagger Management, 645 P.2d 667 (Utah 1982). As stated by the Supreme Court of Maine in Bibber v. Carville, 63 Atl. 303 (Maine 1905):

> "Defects in title do not entitle the grantor to a rescission of the conveyance. [citation omitted] We see no reason why the grantee, who acted in good faith, is not entitled in good conscience to retain the benefit of the contract which he made. The grantor, who received the full price he set upon the property, has no equitable right to deprive him of it simply because he was mistaken as to his title, and is liable upon his covenants. While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconsionable advantage thereby."
>
> 63 Atl. at 304.

It was prejudicial error for the lower court to conclude that the mutual mistake of fact as to Webster's title authorized him to rescind. That claim of mutual mistake was a mere additional pretext for Webster to use as a crutch in an attempt to dishonor a binding agreement.

POINT IV

WEBSTER FAILED TO PROVE A LACK OF MENTAL CAPACITY.

The evidence in the record clearly reflects that Webster was in full control of his mental faculties, that he had capacity to enter into the subject agreements; and that he knew what he was doing with respect to entering into and performing under the agreements. The district court's finding that Webster had a lack of mental capacity or training to independently understand the effect of the transaction is not supported by the evidence and contradicts the applicable law of contractual capacity.

1. The Legal Standard of Contractual Capacity.

The test for determining whether a person has mental capacity to enter into a contract is well established in Utah.

> In ordinary contracts the test is, Were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life.

Hatch v. Hatch, 4 Utah 218, 148 P. 433, 438 (1914). The same test has been adopted for the determination of whether or not a grantor has sufficient mental capacity to make a deed. Anderson v. Thomas, 108 Utah 252, 159 P.2d 142, (1945); Peterson v. Carter, 579 P.2d 329 (Utah 1979). See also, Jimenez v. O'Brien, 117 Utah 82, 213 P.2d 337, (1949). A

finding of a lack of contractual capacity must be by "clear, unequivocal and convincing evidence." Jimenez, supra.

Jimenez is particularly instructive in applying Utah law on contractual capacity to the facts in this case. The plaintiff, Jimenez, while still in the hospital after an automobile accident, signed a form release and a hand-written "supporting statement" for the insurance carrier of the other party in the auto accident in exchange for payment of all hospital costs and $1,000.00. Three weeks later he signed another release in exchange for payment of an additional hospital bill.

In an action to rescind the releases, Jimenez testified that although he read the releases, he really did not understand them. Id. at 341. Several of Jimenez's friends testified that after the accident he had a "depressed and changeable" personality and at other times he appeared to be irrational. One of Jimenez's attending physicians testified that he was not able to "reason normally" while in the hospital. Id. at 342.

This Court said that the expert testimony was not dispositive and even if one assumed the accuracy of the testimony of Jimenez's friends:

> [f]atigue, nervousness, poor emotion control, and lack of ability to concentrate are not necessarily indicative of contractual incapacity although they may well affect a person's judgment. . . . [T]he things a person does

> and says at or about the time he enters into a contract are the best indicia of his mental capacity to make the same."

Id. at 343.

Under Utah law, Webster is bound by the subject agreement. He read the agreement, understood it and accepted money pursuant to it.

> [C]ontracts between . . . parties are binding not because their mental ability nor their judgment is equal, but because they both possess that degree of mental power which the law recognizes as a minimum for persons contracting, viz. sufficient power to comprehend the subject of a contract, its nature and probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life.

Id. at 343.

2. The Evidence Demonstrates Webster's Capacity to Contract. When Webster entered into the contract, he had the capacity to read and understand the agreement. (T.137, 138; Webster 1/7/83 depo. pp. 57-58). He had entered into written consumer contracts in the past with a full understanding of what he was doing. (Webster 5/4/82 depo. pp. 17-18). During his employment as a mechanic Webster had read, understood and used various technical manuals and printed materials. (T.137; Webster 1/7/83 depo. pp. 57-58).

Webster fully comprehended the subject agreement. (T. 135, 170-174; Webster 5/4/82 depo. pp. 23-25, 30, 35). The only limitation Webster demonstrated before the district

court was some difficulty in reading aloud the agreement. This is evidence only of Webster's admitted difficulty in pronouncing some words. (T. 135). Webster's ability to understand the agreement is demonstrated by his several visits to the Lehmers to obtain advances against the agreements. (T. 125-127, 179, 183). As in Jimenez, Webster's conduct underscored his understanding of the agreements.

At the time Webster entered into the agreement, he was physically and mentally healthy, he had not been drinking and he was not under the influence of alcohol. (T. 142-144; Webster 1/7/83 depo. 23-24). In fact, in December of 1980, when he modified and ratified the original agreement, he was in a particularly good frame of mind because he planned to move to Heber City to be married. (Webster 1/7/83 depo. 104-105). Webster did not produce any evidence from doctors, social workers or others with the expertise to support his self-serving and after the fact claims that he suffered from diminished capacity because of depression or consumption of alcohol. His own testimony contradicts that claim.

The evidence "clearly preponderates against" the district court's finding by "clear and convincing" evidence, that Webster lacked the mental capacity to enter into the subject agreement. See, Matter of Estate of Hock, 655 P.2d 1111, 1113 N.1 (Utah 1982). The district court's finding of a lack of mental capacity plainly ignores well-established Utah law.

POINT V

WEBSTER FAILED TO PROVE A CONFIDENTIAL RELATIONSHIP OR UNDUE INFLUENCE.

Webster claimed he trusted the Lehmers, but there is absolutely no evidence in the trial record to even suggest that he was dominated by or under the influence of the Lehmers at anytime. At best, their relationship was only one of casual neighbors. Webster proudly acknowledged he never relied upon the Lehmers' for business advice or the conduct of his day-to-day affairs. Based upon these uncontroverted facts and applicable legal standards the district court erred in making a finding of a confidential relationship and concluding there was undue influence in the formation of the agreement.

1. The District Court Erred in Finding a Confidential Relationship.

This Court has a high legal standard for the creation of a confidential relationship. In Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710, 713 (1965), the Utah Supreme Court declared:

> The evidence is undisputed that there existed among the parties sincere affection, trust and confidence, but is this legally sufficient to constitute a confidential relationship giving rise to the presumption that the transaction was unfair? We think not.
>
> . . .
>
> The relationship must be such as it would lead an ordinarily prudent person in the management

> of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the later for that of the former in the material matters involved in the transaction. . . . Mere confidence in one person by another is not sufficient alone to constitute such a relationship. (Emphasis added).

The holding in Bradbury was reaffirmed in Blodgett v. Martsch, 590 P.2d 298, 302 (Utah 1978) when this Court said that a confidential relationship "is not to be found on the basis of mere friendship or social or religious affiliations between the parties." The only evidence in the record is that Webster and Lehmers had the casual contacts typical of neighbors who have little or no involvement in each others lives.

The district court saw before him a lawyer and a retired miner and concluded that Mary Lehmer should have some undefined obligation to Floyd Webster. The record and the law do not support that conclusion because Webster, as a matter of fact, was not dependent on the Lehmers. Webster's testimony demonstrated that he had a broad range of life experiences and was able to effectively and competently conduct his day-to-day activities. (T. 169-171). Webster admitted that he did not look to the Lehmers for any personal, financial, business or legal advice. (T. 168). He lived independently from and free of any infludence or dominance of the Lehmers (T. 168-169).

The district court attempted to bottom its finding of a confidential relationship upon the casual friendship between

Webster and the Lehmers and Webster's own self-serving testimony that he trusted Mary Lehmer (R. 494, 498). In Bradbury, supra, this Court held that even where both parties testified that they "had trust and confidence" in each other, that is not sufficient to establish a confidential relationship. Id. at 715. There is not a scintilla of credible or competent evidence in the case at bar to support a finding of a confidential relationship.

2. The Trial Court Erred in Finding Undue Influence.

The district court made the erroneous finding that the misuse of a confidential relationship justifies the conclusion that the transaction was the result of undue influence. To the contrary, the district court must first find the confidential relationship and then must find undue influence before it can conclude that the confidential relationship was misused. As with any misuse of a confidentail relationship, there must be facts to support a finding as to how the confidential relationship was misused. There are no facts in this record to support a finding of undue influence by the Lehmers over Webster.

The cardinal element in the doctrine of undue influence is the existence of influence or persuasion asserted by one party over the other. The victims of the undue influence must be "impelled to do that which he would not have done had he been free from such controlling influence." In Re Lavelle's Estate, 122 Utah 253, 248 P.2d 372, 375-376 (1952).

The evidence is clear that not only was there no undue influence or persuasion by Lehmers, but that there was no persuasion at all, unfair or otherwise. The only inducement or persuasion which the Lehmers offered Mr. Webster to enter into the contract was the the purchase price of $5,000.00. (T. 101-102, 167-170; Webster 5/4/82 depo. p. 26).

Even if this Court were to find a confidential relationship, a conclusion of undue influence does not necessarily follow, and in this instance does not follow at all.

> It is not enough that a person is susceptible to undue influence as a result of the confidential relationship. It is not enough that the influence is exerted upon that person. [citation omitted] Persuasion is unfair (or influence is undue) only when it overcomes the will of another such that their own free agency is destroyed. [citation omitted] Undue influence must be proved by evidence that is clear, cogent and convincing.

Furguson v. Jeanes, 619 P.2d 369, 372-373 (Wash. App. 1980). The record in this case is simply devoid of any evidence of unfair persuasion or conduct by Lehmers that they overcame the will of Webster.

The Trial Court relied upon 13 Williston on Contracts 1625 in finding undue influence. (R. 498) Yet even Williston dictates a contrary finding. Williston noted the Courts will find an absence of undue influence if "the party claiming to be victim of undue influence had independent advice or an

opportunity to obtain such advice." 13 Williston on Contracts §625, p. 778.

The Lehmers did not prevent Webster in any way from investigating the status of the property, either before or after Webster signed the agreement. (Webster 1/7/83 depo. 94-95). Moreover, he lived on the property for forty years without investigating the title to the underlying property. In addition, Webster discussed the sale with John Fritch between the October an December agreements. (Webster 1/7/83 depo. pp. 91-92). Webster was only interested in receiving the $5,000.00 price offered by the Lehmers and the offer would have been accepted regardless of any information or advice that was available to him. (T. 147-148). Webster was completely indifferent to his own affairs and not subject to any undue influence in the formation of or in the acceptance of the benefits of the contract.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO GRANT LEHMERS' SPECIFIC PERFORMANCE OF THE AGREEMENT.

Lehmers im good faith undertook the steps and obligations required of them by the agreement to close the transaction with Webster. They advanced $900.00 to Webster between October 7, 1980 and December 21, 1980, secured a survey, (T.293-294; Ex. 12-D), and paid the utility fees. (T.296).

In February of 1981 they sent $1,100.00 to Webster and attempted to arrange for a closing on the property and payment of the balance due. (T.299). Lehmers are ready, willing and able to complete the agreement. (T.303-304).

Specific performance is a remedy which is granted when damages cannot be accurately ascertained or the party cannot be adequately compensated at law. Delivery Service and Transfer Company v. Heiner Equipment, 635 P.2d 21 (Utah 1981). The agreement is a contract for the sale of a squatter's right. Since it is unique, the damages for breach of the contract cannot be determined with certainty and specific performance is an appropriate remedy.

The district court has failed to find any vagueness or ambiguity in the agreement. A fair reading of the agreement in light of the reasonable expectations of the parties demonstrates that it is sufficiently clear and complete to warrant specific enforcement. See, Nixon & Nixon, Inc. v. John New and Associates, 641 P.2d 144, 146 (Utah 1982) and the cases cited therein. The district court erred in not ordering specific performance of the agreement for the sale of the Webster's squatter's rights in Park City, Utah.

C O N C L U S I O N

This case requires reversal. The suit comes down to little more than the ordinary situation in which a seller, after having executed, requesting performance by the buyer,

and substantially performing, himself, the bargain, second-guesses the agreement and decides that he wants to back-out. Because one of the buyers happens to be a lawyer, the "sitting-duck" claim is made that a confidential relationship existed and the lawyer abused it to her advantage. The evidence simply will not permit a finding of a confidential relationship or an abuse thereof by Lehmers. The controlling law has consistently precluded a party from renouncing his contractual commitment under the circumstances of this case.

The lower court prejudicially erred in permitting the squatter's rights of Webster to be evaluated as though the fee simple estate was before the court. The attempt of the district court to get around that error by signing findings relating to the "potential" market value of the squatter rights, was futile, for that is not the applicable legal test. The expert testimony of Pia never focused on "potential" market value, but only addressed the fair market value of the undivided fee. The squatter's rights were not even evaluated by Webster's witness.

At the date of the transaction, Webster did not care who owned the underlying fee -- he would have sold the property to Lehmers for the $5,000.00 price. It was only in February 1981, four months later and after substantial performance by both parties, that Webster changed his mind and wanted out of the deal.

The Lehmers are entitled to an order of specific performance in the sale of Webster's interest in the squatter's rights. This Court should so order or if it is determined that further testimony on the evaluation of the squatter's rights should be received, a new trial should be ordered.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.

E. BARNEY GESAS
of and for
WATKISS & CAMPBELL
310 South Main St., Suite 1200
Salt Lake City, Utah 84101

Attorneys for Appellants
Mary Lehmer and Charles Lehmer