

1964

# Don Cordner and Sylvia Cordner v. Clinger's Incorporated, et al : Reply Brief

Utah Supreme Court

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Quentin L. R. Alston; Attorneys for Appellants;

Hatch & Chidester; Attorneys for Respondents;

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

FEB 6 - 1964

DON CORDNER and  
SYLVIA CORDNER, his wife,

)  
Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

-vs-

) Case No.

) 9866

CLINGER'S INCORPORATED,  
A Utah Corporation, and  
HOWARD R. CLINGER, et al.

Defendants and Appellants.

- o -

REPLY BRIEF

HATCH & CHIDESTER  
Attorneys for Plaintiffs and Respondents  
DON CORDNER and SYLVIA CORDNER  
51 West Center Street  
Heber, Utah

IN THE SUPREME COURT  
OF THE  
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- o -

DON CORDNER and )  
SYLVIA CORDNER, )  
his wife, )

Plaintiffs and )  
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Appellants. )

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REPLY BRIEF

Appellants Brief in support of their  
Petition for Rehearing takes testimony out  
of context for the purpose of showing that  
Justice McDonough's Opinion results from a

mistake. The Opinion setting forth the chronological events in the steps taken in the four-way transaction states: ".... Plaintiff's , however, did not take possession of the Villa Apartments ....". The record (p. 113) clearly establishes that possession was not taken by the Respondents in the consummation of this transaction. Reading of the transcript of the testimony taken at the trial will establish that the possession of each of the various parties involved in the four-way exchange was taken the later part of April, 1961; at this time Griffiths took possession of the Villa; that thereafter the Appellants notified the Respondents that he would not fulfill his commitment to transfer the home in Salt Lake. The record will further show that possession of the Villa Apartments was taken by the Respondents only after the default of the Appellants. At that time Griffiths were

about to abandon the Villa Apartments and were already delinquent in the payments on it.

No objection was made at the trial nor has it been pleaded in this action that the Respondents failed to properly mitigate their damage. The Respondents found themselves in a position through the arrangements made by the Appellants, of having their name on the contract as purchasers of the Villa Apartments. The records clearly show that the Respondents never agreed to accept the Villa Apartments as an alternative to the defaulted contract. Indeed, it shows to the contrary (R p. 118). The payments on the Villa Apartments were not being made and the Respondents names were on the contract as set forth above. Whether or not Respondents would have prevailed in a law suit brought against them by the seller of the Villa Apartments is immaterial.

The required defense of such an action would involve damage to the Respondents and they were entitled to attempt to protect themselves by taking possession in the face of threatened abandonment by Mr. and Mrs. Griffiths for the purpose of seeing that the proceeds from the Villa Apartments were applied against the debts owed thereon.

The balance of the contentions of the Appellants for the third time merely refuse to acknowledge the jury's right to disbelieve the testimony of the defendant in the face of conflicting evidence.

#### CONCLUSIONS

Based on the foregoing Respondents respectfully submit that the Supreme Court did not misconstrue the evidence as contended by Appellants. The allegations of the Appellants are attempt to raise the issue

of mitigation of damages without having heretofore pleaded or otherwise raised said issue. Such contentions also mislead and imply that the Respondents ended up with the Villa Apartments plus received the Judgment in this matter. A thorough check of the record will establish that such is not the case and that possession was received only in a vain attempt to prevent the threatened law suit by the original sellers of the Villa Apartments.

Respectfully submitted,

HATCH & CHIDESTER  
Attorneys for Plaintiff-  
Respondents  
51 West Center Street  
Heber, Utah