

1963

Leo Van Zyverden and Sytske Van Zyverden v.
Ralph W. Farrar and Helen R. Farrar et al : Reply
Brief on Cross-Appeal

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

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

Ronald C. Barker; Attorney for Appellant;

George M. McMillan; Attorney for Respondents;

Recommended Citation

Reply Brief, *Zyverden v. Farrar*, No. 9946 (Utah Supreme Court, 1963).

https://digitalcommons.law.byu.edu/uofu_sc1/4324

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

*cross appeal - Rule 74(b)
Rule 75 - (d) 5 Cross appeal*

IN THE SUPREME COURT OF THE STATE OF UTAH

**LEO VAN ZYVERDEN and SYTSKE VAN
ZYVERDEN, his wife,**
Plaintiffs, Respondents
and Cross-Appellants,

vs.

**RALPH W. FARRAR and HELEN R. FARRAR,
his wife, Defendants, and SEAGULL IN-
VESTMENT COMPANY,**
Defendant and Appellant.

No. 9945

SEAGULL INVESTMENT COMPANY,
Plaintiff and Appellant.

vs.

**LEO VAN ZYVERDEN and SYTSKE VAN
ZYVERDEN, his wife,**
Defendants and Respondents.

No. 9946

Reply Brief on Cross-Appeal

**Cross-Appeal from the Judgment of the Fourth Judicial
District Court in No. 9945 (2449 below),
Honorable R. L. Tuckett, Judge**

**Ronald C. Barker
2870 South State Street
Salt Lake City, Utah
Attorney for Seagull
Investment Company**

**George M. McMillan
1020 Kearns Building
Salt Lake City, Utah
Attorney for Van Zyverdens**

TABLE OF CONTENTS

	Page
Introductory Statement	3
Point I. The Cross Appeal is properly before the Court.	4
Point 2. Van Zyverden's claim for relief is supported by the evidence.	10
Point 3. The Van Zyverden's should have been allowed to prove damages.	14
Summary and Conclusion	16

INDEX OF AUTHORITIES

4 Am Jur 2d, Appeal and Error § 177	5, 6
Buttrey v. Guaranteed Securities Co. (1931) 78 Ut. 39 300 P. 1040	5
28 USCA § 732 b 7 FCA Title 28 § 732b,	6
Hadley v. Baxendale (1854), 9 Ex. Ch. 341	14
Jenkins v. Morgan (1953) 123 Ut. 480, 260 P(2d) 532	15
Maw v. Noble (1960) 10 Ut(2d) 325, 353 P(2d) 165	12, 13

Melford State Bank v. Westfield Canal & Irrigation Company (1945) 108 Ut. 528, 162 P (2d) 101..	11
Pacific Coast Title Ins. Co. v. Hartford Acc. & Ind. Co. 7 Ut.(2d) 377, 325 P (2d) 906	14
UCA 1943, as amended, Sec. 20-2-4.10	6
UCA 1953, Volume 9	5
Utah Rules of Civil Procedure, Rule 1(a)	6
Utah Rules of Civil Procedure, Rule 73.....	8, 9, 10
Utah Rules of Civil Procedure, Rule 74(b)	4, 5, 6, 7, 8, 9, 10
Welchman v. Wood (1960) 10 Ut. (2d) 325, 353 P(2d) 165	12, 13, 14
Western Development Co. v. Nell (1955) 4 Ut(2d) 112 288 P (2d) 452	11

IN THE SUPREME COURT OF THE STATE OF UTAH

LEO VAN ZYVERDEN and SYTSKE VAN ZYVERDEN, his wife,	} Plaintiffs, Respondents and Cross-Appellants,	} No. 9945
vs.		
RALPH W. FARRAR and HELEN R. FARRAR, his wife, Defendants, and SEAGULL IN- VESTMENT COMPANY,	} Defendant and Appellant.	
vs.		
SEAGULL INVESTMENT COMPANY,	} Plaintiff and Appellant	} No. 9946
vs.		
LEO VAN ZYVERDEN and SYTSKE VAN ZYVERDEN, his wife,	} Defendants and Respondents.	

Reply Brief on Cross-Appeal

INTRODUCTORY STATEMENT

The Rules do not make provision for filing of a brief in response to an appellant's reply brief. In the instant case, however, the appellant has advanced some arguments in its reply brief which were not and could not have been reasonably anticipated in the respondent's

original brief. In view of the novelty and importance of the questions raised it seems appropriate to file a short brief dealing with the newly raised issues. This brief does not attempt to restate the facts, or to reargue the questions involved with respect to applicable theories of unlawful detainer or restitution of the premises.

POINT I: THE CROSS APPEAL IS PROPERLY BEFORE THIS COURT.

In its reply brief Seagull has challenged the jurisdiction of the court to consider the cross appeal.

Seagull's attack on the Court's jurisdiction appears to be due to a confusion in the meaning of the terms "appeal" and "cross appeal." In former Utah practice the terms meant the same thing with regard to procedural requirements, but under modern Utah practice they do not. Under former practice the qualifying adjective "cross" was used to designate an appeal by a party who was already a respondent in another appeal from the same case. The designation was used as a matter of convenience and did not indicate that the cross appeal was a special procedure that differed from any other kind of appeal.

The term "cross appeal" under modern practice both in Utah and other states has a special meaning. It does not exist as a special procedural technique under the Federal Rules of Procedure. (Rule 74 (b) of the Utah Rules is not found in the Federal Rules).

A cross appeal is a special procedural technique

that permits an appellant to seek appellate relief as an incident to proceedings already before the reviewing court by the appeal of the opposing party. The proceeding is available only where authorized by statute or procedural rules. 4 *Am. Jur. 2d*, 687 *Appeal and Error* § 177.

Prior to the adoption of the Rules of Civil Procedure the cross appeal did not exist as a separate procedural technique. (See Note under Rule 74 (b) in Volume 9 UCA, 1953. An examination of prior statutes and the case law shows this note to be correct.) While the courts made occasional reference to “cross appeals” it is clear from both interpretation and discussion that the term cross appeal was synonymous both in meaning and requirements with the term “appeal.” For an excellent discussion on this point see *Buttrey v. Guaranteed Securities Company*, (1931) 78 Ut. 39, 300 P. 1040. (Subsequent case law, statutes, and procedure made no changes in the law there discussed until the adoption of the rules in 1949 and their implementation in 1950.)

Under former law, Utah law and procedure recognized only one kind of appeal and the requirements for appeal fell alike on both the appellant and the respondent. Each, in effect, if he desired to appeal had to meet the same requirements and to perfect separate appeals. The technique was wasteful of time of the litigants, time of the court, and was slow, unnecessarily troublesome, duplicative of both time and effort by each litigant, and unnecessarily expensive.

It is clear that the creation of cross appeals in Utah by the adoption of the Rules is harmonious with the basic concert and purpose of the rules. That purpose has been enunciated many times by this Court, and is nowhere better expressed than in Rule 1(a):

“These rules . . . shall be liberally construed to secure the *just, speedy, and inexpensive* determination of every action.” (Emphasis added).

The creation of the cross appeal in Utah by Rule 74 (b) has the salutary effect of making the determination of action on appeal more just, speedy, and inexpensive than the former procedure with no possibility of prejudice to the litigants. (4 *Am. Jur.* 2d, *supra*, at page 688).

The cross appeal created under the new practice is merely a simplification of the former procedure which required the respondent to make a separate appeal. The new procedural technique is both sound and practical. It dispenses with notice, bond, and other procedural technicalities which are admittedly important when a matter is first appealed, but become merely burdens unnecessarily imposed when both the parties and the action are already before the Court.

It is true that the Utah act which enabled the Supreme Court to adopt the Rules (20-2-4.10 *UCA* 1943, *as amended*) carried with it restrictions adopted from the language of the enabling act for the federal rules. (28 *USCA* § 732 b, 7 *FCA Title* 28 § 732 b.) Such a restriction was necessary because of the Constitutional

requirements of separation of powers, but it clearly applies to matters that are clearly a question of substantive rights not merely matters of procedure. In a sense, any change of procedure that permits a different kind of procedure “modifies” the “rights of the litigants. The argument is especially pernicious under the instant circumstances where Seagull argues that the Van Zyverdens should be denied their right to cross appeal because the *Van Zyverden's have complied with the existing procedure and thus failed to follow the former different procedure*. But Seagull's argument is not only unfair; it is also unsound. Applying the traditional test of substance and procedure enunciated by the Federal courts under the Erie doctrine, it can readily be seen that the outcome of the case on the merits is not going to be affected by a change in time and manner of filing additional questions on appeal.

The argument that the enabling act restricted the power of the Supreme Court to adopt new rules that did not preserve the antiques of the old procedure is untenable. Seagull's argument that any change in the old procedure is beyond the power of this Court because it “abridges,” “enlarges,” or “modifies” the substantive rights of the litigants in this (or any other) case is not supported by any authority.

The basic attack which the appellant Seagull makes on the validity of Rule 74 (b) is that the Supreme Court has changed the time in which a cross appeal can be filed. Since there was no such thing as a cross appeal

before the Rules, the Rules did not change the time for filing cross appeals they created it. If Seagull's attack depends, as it does, on Utah law prior to the Rules, then it should be directed at the modification of time made under Rule 73. Seagull seems obsessed with the thought that Rule 73 which deals with appeals and not cross appeals applies also to cross appeals. But Seagull is understandably silent in attacking the reduction of time from 90 days allowed by the procedure just prior to the rules to the one month (not the 30 days of the Federal Rules) permitted by the Utah Rules. The time for appeals has been changed several times in Utah procedure. It has been as high as one year and as short as one month. The inconsistency of Seagull's argument is apparent. If "changing" the time for cross appeals under Rule 74 (b) "modifies" substantive rights, then the actual change of time for appeals under Rule 73 (a) must also "modify" substantive rights. That is particularly true in the instant case. The Van Zyverden's have complied with the requirements of the 74 (b) for a cross appeal. If that action was now held to be invalid, and the one month requirement of 73 (a) was nonetheless held to be valid, the VanZyverden's would be completely deprived of a right to appeal. Such a determination would clearly "modify" and "abridge" the rights of the Van Zyverdens. It is submitted, however, that the whole argument is ridiculous. To hold otherwise would give procedural problems the status of substantive rights and

would pull a thread that would unravel the whole fabric of the Utah Rules of Civil Procedure.

The new procedure does not affect anyone's substantive rights in any way except that it provides machinery to resolve them more justly, more speedily, and less expensively. Both the problems of time of filing and questions of how particular matters can be brought before the Court are clearly procedural matters and not substantive ones. The outcome of a case on the merits is not going to be affected by the fact that an appeal must now be filed in one month instead of the 90 days, six months, or a year permitted by former practice; or by the fact that a cross appeal can be filed after the one month period (but still less than 90 days); or by the fact that the cross appellant does not have to file a bond.

Rule 73 (c), which requires a bond on appeal, does not and should not apply to cross appeals. The purpose of the bond is to protect parties from spurious, harrasing, or financially irresponsible appeals. When an original appellant has already brought the matter before the Supreme Court and posted bond, additional cost burdens are not likely going to be created by the consideration of a cross appeal. Rule 74 (b), which creates the procedural concept of cross appeal, makes no bond requirement. It is clear that case law prior to the rules which dealt with "cross appeals" that were procedurally and practically no different from regular appeals is not applicable to the new "cross appeal"

created by Rule 74 (b). Since a cross appeal is not an appeal, Rule 6 (b) on enlargement of time is applicable to cross appeals and Rule 73 (a), which deals only with appeals, does not apply.

Neither the law nor the concept of the rules justifies an acceptance of the appellant's attack on the rules or its attack on the jurisdiction of the Supreme Court to consider the cross appeal.

POINT II.

VAN ZYVERDEN'S CLAIM FOR RELIEF IS SUPPORTED BY THE EVIDENCE.

In their reply brief, the defendant concedes that the plaintiff's case is based on the meaning of the contract provision which states that the Hi-Land milk base *can be exchanged* for livestock or horses of equal value.

The problem of construing contract language has been confronted many times by the Supreme Court of Utah. Even experienced lawyers experience difficulty in drafting contracts with the absolute precision that is often necessary to avoid lawsuits. A certain degree of ambiguity is present in every written document and especially, as here, in documents drafted by parties only casually acquainted with the law. As has been said, the heart of this lawsuit is to determine the intentions of the parties. Their conduct and the language they adopted are equally relevant in determining such intentions.

Seagull argues that the Van Zyverdens are seeking to “reform” the contract by parol. This is not so. Van Zyverdens do insist that the trial court should have been primarily concerned with the intent of the parties as evidenced by the contract, the facts *surrounding the execution of the contract*, and by the interpretation which the parties themselves place upon it. Case law cited by Seagull to the effect that the court will not consider external evidence *inconsistent* with the working of the contract is not here applicable.

The fact that there is argument over the meaning of the representation in the contract is evidence of some degree of ambiguity. The language of this court in *Melford State Bank v. Westfield Canal Irrigation Company* (1945) 108 Ut. 528, 162 P(2d) 101, is particularly appropriate:

“The disagreement of the parties interested clearly shows that the contract involved is ambiguous and without extrinsic evidence the true intentions of the parties cannot be determined.”

In *Western Development Company v. Nell* (1955) 4 Ut. (2d) 112, 288 P(2d) 452, this Court held that intention of the parties’ controls and where that intention can be discovered from the instrument that the Court will not invoke arbitrary rules of construction. The Court approved the consideration of extrinsic evidence to assist in determining the intent of the language of the instrument, and the Court further held that proof of intent of *a different meaning than the usual meaning of the words was permissible*.

In *Marw v. Noble* (1960) 10 Ut.(2d) 440, 354 P (2d) 121, the Court stated:

“The primary and a more fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect.”

Seagull spends much time in their brief discussing various evidentiary and speculative considerations (for example the elaborate speculation on pages 9 and 10 of reply brief of what the Van Zyverdens’ proof of loss *might* have shown) that are really not germane to the issues. The real issue of this case, as they concede, is whether “can be exchanged” is a warranty.

The Utah law on warranty in real estate contracts is set out in (1960) *Welchman vs. Wood*, 10 Ut.(2d) 325, 353 P (2d) 165. The Court quoted the Sales Act and recognizing that the Sales Act normally deals with the sale of goods. It stated that the warranty portion was an accurate statement of property law. This Court held that a promise or affirmation of fact is an express warranty if the natural tendency thereof is to induce and it does induce the party to enter into the transaction.

It is evident that intent is an essential consideration in any alleged warranty. Only through a consideration of the surrounding circumstances can a court determine if a party was induced into purchasing by a representation. Seagull challenges the materiality of the intent

in an apparent attempt to blur the fact that even Farrar's own testimony supports the importance of this representation in effecting the sale. The Van Zyverdens are not, of course, trying to reform the instrument by parole as Seagull suggests. They are only asking this Court to recognize that the evidence shows that (1) Farrar did make the representation; (2) the tendency of the representation was of such a nature that its natural tendency would be to induce the Van Zyverdens to buy; (3) Van Zyverden made certain that the provision was in the contract before he agreed to buy and therefore it did induce him to buy.

Seagull concedes that in spite of the fact that Farrar represented that the milk base and equipment could be exchanged that it in fact could not, but they insist that the Van Zyverdens had constructive knowledge of this fact. Even if that is true, (which Respondents stoutly deny) it does not relieve Farrar or his assignee, Seagull, from the warranty. A person can even warrant that things which cannot possibly happen will occur and the warrantor by his warranty agrees to respond in damages for their non-occurrence (*Welchman vs. Wood*, *supra*).

Seagull alleges that since Van Zyverden was the one who inserted the provisions that it must be construed against him. That is not an accurate statement of the law. This Court held in (1960) *Maw vs. Noble*, 10 Ut.(2d) 440, 354 P(2d) 121, that the Court should *first* consider the surrounding circumstances. Only if

they cannot determine the intent of the parties from the surrounding circumstances should the rule of strict construction be applied against the drafter. Even though the facts of this case do not justify its application here, it is respectfully submitted that such a rule should have no application in warranty considerations at all, since a person who desires a warranty is most likely to be the one who insists on it being inserted in a contract. To apply an arbitrary rule of law that a representation could not be a warranty because it was drafted by the party who sought to rely on it would seem to defeat the basic purpose of warranties.

POINT THREE: THE VAN ZYVERDENS SHOULD HAVE BEEN ALLOWED TO PROVE DAMAGES.

The Van Zyverdens' right to damages is clearly enunciated in *Welchman v. Wood*, cited *supra*, it is in the language of the Court,

“A person may warrant the occurrence of future events or of events which could not possibly happen. The substance of such a warranty is in effect *a promise to respond in damages* proximately caused by the non-existence of a represented fact.” (Emphasis added).

It is clear that rule of *Hadley v. Boxendale*, which is elaborated in the Van Zyverdens' earlier brief, is applicable in Utah. In *Pacific Coast Title Ins. Co. v. Hartford Acc. & Ind. Co.* (1958) 7 Ut.(2d) 377, 325 P.(2d) 906, this Court stated the rule as follows:

“The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable foreseeability that loss of such general character would result from the breach. Therefore, to be compensable, the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had adverted to breach when the contract was made, loss of such character would have been within their contemplation.”

The Van Zyverdens should have been allowed to put on proof of loss of profits. The Utah law on this point is stated in (1960) *Jenkins v. Morgan*, 123 Ut. 480, 260 P (2d) 532:

“Prospective profits to be derived from a business which is not yet established, but merely in contemplation are *generally* too uncertain and speculative to form a basis for recovery.

[but]

. . . the language of Rule 73 (d) allowing damages for delay may *in a proper case* permit compensation for some increased beneficial use *where the objection as to the enterprise’s speculative character is overcome by competent proof.*”
(Emphasis added).

This language clearly shows that loss of profits in a prospective business *are recoverable if they are proven.*

It will be noted that the Court rejected the offer of proof, not as incompetent proof, but on the mistaken theory that such damages were not recoverable. It is

this error that requires reversal on the portion of the case respecting damages.

SUMMARY AND CONCLUSION

Respondent's cross-appeal complies with the applicable rules of this court as they are presently constituted. The substantive rights of the appeal are not affected by the changes in the procedural requirements incident to cross-appeals. The authorities cited by the appellants under the old statutes are not applicable.

The authorities cited by the appellants overlook the fact that the primary concern of courts in the construction of contracts is to determine the intention of the parties. Particularly in the light of *Welchman v. Wood*, it is apparent that the parties intended that the seller was warranting the fact that the milk base could be exchanged. Seagull must be made to respond in damages for the non-occurrence of the event which was warranted. All of the damages sustained by the Van Zyverdens, including the reasonably justifiable loss of profits, are recoverable by them and should be offset against any liability to the sellers under the agreement.

RESPECTFULLY SUBMITTED, this 11th day of December, 1963.

GEORGE M. McMILLAN and
V. RENE NELSON
Attorneys for Appellant
1020 Kearns Building
Salt Lake City, Utah