

1983

**U-M Investments, A Utah Limited Partnership v. Dale v. Ray, et al.
And Terrell L. Bird And Janet L. Bird v. Ross A. Ray And Perry Ray :
Brief of Appellants**

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

U-M INVESTMENTS, a Utah)
limited partnership,)
Plaintiff,)
vs.)
DALE V. RAY, et al.)
Defendants.)

Case No. 19121

TERRELL L. BIRD AND JANET)
L. BIRD,)
Appellants,)
vs.)
ROSS A. RAY and PERRY RAY,)
Respondents.)

BRIEF OF APPELLANTS

An appeal from a judgment of the
Fifth District Court of Iron County
the Hon. Robert F. Owens, Judge

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IN THE SUPREME COURT
OF THE
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U-M INVESTMENTS, a Utah)
limited partnership,)
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IN THE SUPREME COURT OF THE STATE OF UTAH

U-M INVESTMENTS, a Utah)
limited partnership,)
Plaintiff,)

vs.)

DALE V. RAY and PHEBE RAY,)
his wife; JAY C. HANSEN and)
ARDELLE H. HANSEN, his wife;)
HARRY RANDALL and DEMA RANDALL,)
his wife; FRED BERGSTROM and)
CONNIE BERGSTROM, his wife;)
HOWARD THORLEY and TREVA PEG)
THORLEY, his wife; W. GARY)
RINEHART and GENEVIEVE V.)
RINEHART, his wife; LAWRENCE)
D. LAWLOR and BARBARA J.)
LAWLOR, his wife; TERREL L.)
BIRD and JANET L. BIRD, his)
wife,)
Defendants.)

Case No. 19121

vs.)

ROCKY MOUNTAIN TITLE AND)
ABSTRACT COMPANY, a Utah)
corporation, DOUGLAS W. CHURCH)
and FRANKLIN H. BUTTERFIELD,)
Third-Party)
Defendants.)

TERRELL L. BIRD and JANET)
L. BIRD,)
Appellants,)

vs.)

ROSS A. RAY and PERRY RAY,)
Respondents.)

APPELLANTS' BRIEF ON APPEAL

STATEMENT OF THE KIND OF CASE

This is an action to recover a judgment against two sureties on a supersedeas bond.

DISPOSITION IN THE LOWER COURT

The trial court dismissed appellants' motion for judgment against the sureties, holding in effect that the supersedeas bond did not cover the face amount of the judgment.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the ruling of the trial court. The case should be remanded with instructions to enter judgment against the sureties.

STATEMENT OF FACTS

After the trial and retrial of a very complex case involving numerous parties and issues, appellants Terrel L. Bird and Janet L. Bird (hereinafter referred to as "Birds") obtained a judgment against defendants, Dale V. Ray, Fred Bergstrom and others, in the amount of \$128,500.00 plus interest (R-1, Page 7; R-2, Page 7).

Ray and Bergstrom appealed the District Court judgment to the Utah Supreme Court, and the appeal was eventually dismissed. U.M. Investments v. Ray, et al. (Utah 1982), 658 P.2d 1186.

In order to prevent Birds from executing on the judgment while the appeal was pending, Ray and Bergstrom posted a supersedeas bond in the amount of \$128,500.00, being the exact amount of the judgment (R-4).¹ The sureties on the bond were Ross A. Ray and Perry Ray.

After the appeal was dismissed, Birds moved in accordance with Rule 73(f), Utah Rules of Civil Procedure, and in accordance with the terms of the supersedeas bond for judgment against the sureties (R-5). The sureties, Ross and Perry Ray, resisted the motion, and after hearing arguments and reviewing briefs submitted by the parties, the trial court dismissed Birds' motion for judgment (R-9).² The trial court in effect ruled that the supersedeas bond covered costs and damages but not the face amount of the judgment.

Although there were numerous parties to the original action, the issues on appeal relate solely to appellants Bird and the sureties Ross and Perry Ray.

¹ The complete supersedeas bond is reproduced at Appendix I of this brief.

² Rule 73(f), Utah Rules of Civil Procedure provides for enforcement against the sureties on motion, without the necessity of an independent action. An order denying motion for judgment on an appeal bond is an appealable order. Merritt v. J. A. Stafford Company, 440 P.2d 927 (Cal. 1968).

ARGUMENT

POINT I

THE SUPERSEDEAS BOND WAS INTENDED TO COVER
PAYMENT OF THE JUDGMENT

The extent of liability under a supersedeas bond must be determined in accordance with the real or the presumed intention of the parties. Aviation Credit Corporation v. Conner Airlines, Inc. (5th Cir. 1962), 307 F.2d 685. Under the language of the supersedeas bond in the instant case, the sureties promise that the appellants will pay all damages and costs which may be awarded on appeal or on a dismissal thereof, not exceeding \$128,500.00, plus interest at 12% from the date of judgment. Although the language of the bond is stated in terms of damages, rather than payment of the judgment, it is Birds' position that the clear intention of the parties was to cover the judgment amount. The supersedeas bond taken as a whole, the statutory requirements relating to said bonds, the very purpose of the bond, and all of the surrounding circumstances clearly support such an intention. Specifically, the factors evidencing the intent of the parties are as follows:

1. Statutory Requirements. Rule 73(d), Utah Rules of Civil Procedure, provides that whenever a stay on appeal is desired, the appellant shall present a supersedeas bond. The

rule provides: ³

"The bond shall be conditioned for the satisfaction of the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed . . .

When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount . . . "

Thus, it is clear from the rule, that unless the Court after notice and hearing fixes a different amount, a supersedeas bond must be conditioned upon the satisfaction of the judgment in full. It would be unreasonable to presume that the parties intended to execute and file a bond that materially varied from the statutory requirements.

Generally, parties are presumed to be contracting under existing law, and every contract impliedly contains the laws existing at the time. Beehive Medical Electronics, Inc. v. Industrial Commisson, 583 P.2d 53 (Utah 1978); Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975).

2. Amount of the Bond. The amount of the supersedeas bond is the exact amount of the judgment - \$128,500.00, plus interest at 12% from the date of the judgment. That amount, including the interest, is mentioned both in the

³ The applicable rules in their entirety are reproduced at Appendix II of this brief.

recitation clause and the undertaking clause of the supersedeas bond. Two references to this exact amount in such a short document are not merely coincidental, but are indicative of the intention of the parties. The fact that the judgment amount and the bond amount are identical is strongly indicative that the sureties intended to be bound for the payment of the judgment.

3. Existence of Separate Cost Bond. It is important to note that the appellants posted a \$300.00 cost bond under Rule 73(c), Utah Rules of Civil Procedure, as well as the \$128,500.00 supersedeas bond (R-3). The fact that two separate bonds were filed is further indication that the parties intended the supersedeas bond to in fact be a supersedeas bond and not something less.

4. Purpose of the Supersedeas Bond. It is elementary that the whole purpose of a supersedeas bond is to secure the prevailing party. At 9 Moore's Federal Practice §208.06(2) (2d. Ed. 57) it is stated as follows:

"The conditions of the supersedeas bond follow from the nature of the bond itself. The purpose for requiring a bond is to secure the prevailing party against any loss that he may sustain as a result of an ineffectual appeal".

Contracts are to be construed in such manner as to give effect to the purpose which the parties sought to accomplish. Stangl v. Todd, 554 P.2d 1316 (Utah 1976). If the supersedeas bond is construed as respondents would contend,

the entire purpose would be frustrated. In fact, the bond would become meaningless and worthless to the prevailing party.

5. Construction Against Party Using Words. The supersedeas bond was filed by the original appellants and their sureties. Birds had nothing to do with the preparation of the bond. As stated in Christopher v. Larsen Ford Sales, Inc. 557 P.2d 1009 (Utah 1976), it is the policy of the law to look with disfavor upon semi-concealed or obscure self protecting provisions in a document prepared by one party, which the other party is not likely to notice. Any uncertainties or ambiguities are to be resolved against the party drawing it. Wagstaff v. Remco, Inc., 540 P.2d 931 (Utah 1975); Wells Fargo Bank v. Midwest Realty and Finance Company, 554. P.2d 882 (Utah 1975).

6. Title. The document filed with the court is titled "supersedeas bond". The title itself is an indication of the parties intent. If the instrument is construed in accordance with the contention of the respondents, then the instrument is simply not a supersedeas bond as that term is used in Rule 73(d). The appellants and sureties called the document a supersedeas bond; Birds relied upon it as being a supersedeas bond; and this Court ought to construe it as a supersedeas bond. It has been held that the sureties on a superedeas bond are estopped from denying the recitals contained in the bond.

Pratt v. Gilbert, 8 Utah 54; 29 Pac. 965 (1892). They likewise should be estopped from claiming that it is something other than what is represented by its title.

7. Fraud Upon the Court and Parties. If the language of the supersedeas bond was deliberately framed so as to exclude the judgment from the undertaking under the bond, then such conduct would seem to approach fraud upon the Court and the parties. If such were the case, the sureties would have deliberately filed a bond that was not in compliance with the statutes; would have called it something that it wasn't; would have used numerical figures to mislead the parties; and would have filed an illusionary instrument. Certainly if such were the case, the sureties should not now be permitted to benefit from such conduct. Birds do not seriously contend that the parties committed a fraud. Rather, they urge that it was always the clear intention of the sureties to be bound upon the supersedeas bond in the customary manner. It would be unreasonable to interpret the language of the bond in such a way as to imply a fraud.

8. Damages. Under the language of the bond, the sureties undertake to pay all "damages" awarded against the appellants on appeal. It is again important to note that the bond language is not "damages for delay" as that term is used in Rule 73(d), but is an unrestricted use of the word "damages". In the broad sense, the term damages covers any

pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury. BLACKS LAW DICTIONARY, 466 (4th Ed. 1951). Therefore the amount of the judgment awarded to Birds does represent damages suffered by them. The term damages can easily be construed to include the judgment. Looking at the supersedeas bond as a whole, would compel such a construction.⁴

9. Interest. If the supersedeas bond was not intended to cover the judgment, why would it provide for the sureties to pay interest at the judgment rate, and from the date of judgment? If the damages were something different from the judgment, there would be no logic at all in backcharging interest on the damages to the date of the judgment. The answer is obvious. The whole intention of the parties was to bond for payment of the judgment, and the interest provision dovetails with that intention.

When all of the above factors are considered together, the intention of the parties becomes crystal clear. The supersedeas bond was intended to cover the face amount of the judgment plus interest. Any other interpretation would do violence to the language of the instrument, the requirements of the statute, and the purpose sought to be accomplished.

⁴ For further authorities, see Page 9, supra.

The sureties cited to the lower court, and will undoubtedly cite to this Court, cases from other jurisdictions to the effect that bonds must be strictly construed. Some of the cases do in fact hold that a bond which is not specifically by its terms conditioned for the payment or satisfaction of the judgment but for the payment of costs and damages cannot by construction be given that effect. The authorities covering this issue are annotated at 124 A.L.R. 501.⁵ The authorities cited in the annotation, however, are by no means uniform. The majority of state cases mentioned in the annotation⁶ hold that the bond cannot be construed to extend to the judgment (although many of the cases deal with appeal bonds not operating as a supersedeas). The majority of the federal cases, and a minority of the state cases cited in the annotation squarely hold that an appeal bond, although in terms not conditioned for the payment of the judgment, but for the payment of all costs and damages, may be construed to have that effect, particularly where it is a supersedeas bond and the appeal is made to operate as a supersedeas on the judgment. No Utah cases are shown in the annotation. The annotation further cites a controlling principle as follows

⁵ 124 A.L.R. 501. "Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction."

⁶ At 5 AM. JUR.2d, Appeal and Error §1054, this now appears to be cited as a minority position.

(Page 501):

"This rule (of strict construction) does not imply that a strained construction is to be put on the words of a bond in favor of the surety. The rule of strict construction, as applied to contracts of suretyship and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined".

The issue before the Court in the instant case involves the construction of a specific and a unique instrument. The facts are not similar to any authority cited by the sureties. None of the cases upon which they rely involve a situation where the statute requires that the bond be conditioned upon payment of the judgment; where the bond is in fact given for the exact amount of the judgment; where the instrument is designated by its title as a supersedeas bond; where a simultaneous separate cost bond is given; and where interest under the bond specifically is tied to the judgment date. Here, the intention of the parties was clear, and the Court should so determine in accordance with the ordinary rules for construction of written contracts.

POINT II

A SUPERSEDEAS BOND IS EFFECTIVE UPON DELIVERY

Counsel for the sureties argued to the lower court that a supersedeas bond is not effective at all until approved by the Court.⁷ Here, neither the sureties nor their principal

⁷ Rule 62(d), Utah Rules of Civil Procedure, provides that a stay is effective when the supersedeas bond is approved by the Court.

sought nor obtained court approval. They simply filed the bond to obtain the stay. Birds made no objection to the sureties under Rule 62(i), Utah Rules of Civil Procedure; did not challenge the bond for lack of Court approval; and made no attempt to execute upon the judgment during the appeal. Although Birds could have made a technical challenge, they chose not to do so and relied upon the bond. There is nothing whatsoever in either Rule 73 or Rule 62, Utah Rules of Civil Procedure which states or implies that under such circumstances a duly executed and filed supersedeas bond becomes ineffective. Indeed, it seems rather surprising that the sureties would seriously urge the Court to be relieved from a solemn bond because of the failure to do something which either they or their principals were required to do to perfect the stay.

In any event, the law is clear that sureties on a bond become legally liable even if a bond is insufficient to effect a stay of execution. This principle is discussed at length in Merritt v. J. A. Stafford Company, 440 P.2d 927 (Cal. 1968) where the Court states as follows:

"It has been held that undertakings may be enforced although not in exact conformity with the statute, that the defect may be waived, that the obligor is in no position to complain that his obligation is less onerous than that provided for by statute, and that, where the appellant has the benefit of the bond, the obligor may not rely upon the fact that the respondent could but did not object to the sufficiency of the bond (authorities cited)."

See also the annotation at 120 A.L.R. 1062, where it is stated as follows:

"The sureties generally are held liable on a supersedeas or appeal bond, although it was legally insufficient to effect a stay of proceedings, where as a matter of fact there was in effect a stay, no execution being issued, nor any attempt made to collect an execution if issued, or to enforce the judgment".

More than 50 cases are cited for the above statement. The annotation also points out that the receipt of the bond itself furnishes a sufficient consideration for its enforcement.

CONCLUSION

Based upon all of the arguments and authorities as cited herein, it is respectfully urged that the judgment of dismissal be reversed and the trial court directed to enter judgment against the sureties. The intention of the parties was clear, and the supersedeas bond should be construed to obligate the sureties for the payment of the judgment.

Respectfully submitted,

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APPENDIX I

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IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|--|---|------------------|
| U-M INVESTMENTS, a Utah, limited partnership, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | SUPERSEDEAS BOND |
| |) | |
| DALE V. RAY and PHEBE RAY; |) | |
| JAY C. HANSEN and ARDELLE H. |) | |
| HANSEN; HARRY RANDALL and |) | |
| DEMA RANDALL; FRED BERGSTROM |) | |
| and CONNIE BERGSTROM; HOWARD |) | |
| THORLEY and TREVA PEG THORLEY |) | |
| W. GARY RINEHART and GENEVIVE |) | |
| RINEHART; LAWRENCE D. LAWLOR |) | |
| and BARBARA J. LAWLOR; TERREL |) | |
| L. BIRD and JANET L. BIRD, |) | |
| |) | |
| Defendants, |) | |
| |) | |
| vs. |) | |
| |) | Case No. 18216 |
| ROCKY MOUNTAIN TITLE AND |) | |
| ABSTRACT COMPANY, a Utah |) | |
| corporation and FRANKLIN H. |) | |
| BUTTERFIELD, |) | |
| |) | |
| Third-Party |) | |
| Defendants. |) | |

WHEREAS, defendants/appellants Ray, Hansen, Randall and Bergstrom have appealed to the Supreme Court of the State of Utah from a Judgment dated the 21st day of December, 1981 in the Fifth Judicial District Court in and for Iron County, State of Utah (entitled as above, Civil No. 7563) in favor of defendants Terrel L. Bird and Janet

L. Bird for the total sum of ONE HUNDRED TWENTY-EIGHT THOUSAND FIVE HUNDRED DOLLARS (\$128,500.00) with interest thereon at the rate of TWELVE PERCENT (12%) per annum from December 29, 1981.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned, ROSS A. RAY and
PERRY RAY,

does hereby undertake and promise, on the part of appellants, that said appellants will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof, not exceeding, ONE HUNDRED TWENTY-EIGHT THOUSAND FIVE HUNDRED DOLLARS (\$128,500.00), with interest thereon at the rate of TWELVE PERCENT (12%) per annum from December 29, 1981, to which amount the undersigned ROSS A. RAY and
PERRY RAY acknowledges itself bound.

The undersigned, ROSS A. RAY and
PERRY RAY does hereby submit itself to the jurisdiction of the Fifth Judicial District Court of Iron County, State of Utah and irrevocably appoints the Clerk of said Court as its agent, upon whom any papers affecting its liability, if any, may be enforced on motion without the necessity of an independent action.

DATED this 22nd day of March, 1982.

ROSS A. RAY
PERRY RAY

(c) **Bond on Appeal.** At the time of filing the notice of appeal, the appellant shall file with such notice a bond for costs on appeal, unless such bond is waived in writing by the adverse party, or unless an affidavit as hereinafter described is filed. The bond shall be in the sum of \$300.00 unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall be with sufficient sureties and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. The adverse party may except to the sufficiency of the sureties in accordance with the provisions of Rule 62(i). If the appellant makes and files with the clerk of the court from which the appeal is taken, an affidavit in the form set out in section 21-7-3, Utah Code Annotated 1953, no bond on appeal shall be required.

(d) **Supersedeas Bond.** Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its

approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(e) **Failure to File or Insufficiency of Bond.** If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the record on appeal has not been filed in the Supreme Court, a bond may be filed at such time before the record is so filed as may be fixed by the district court. After the record is so filed, application for leave to file a bond may be made only in the Supreme Court.

(f) **Judgment Against Surety.** The bond or undertaking given pursuant to subdivisions (c) and (d) of the Rule, shall, in addition to other requirements, provide that each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served, and that his liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motions as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.