

1992

Utah State Retirement Board, as trustee of Utah State Retirement Fund, a common trust fund v. Priceview, LTD., a Utah limited partnership; Price K. M., a Utah limited partnership; Franz C. Stangl, III, individually and as Personal Representative of the Estate of Elizabeth Ann Stangl; and John Does 1 through 20 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 920724

UTAH STATE RETIREMENT BOARD, :
as trustee of UTAH STATE :
RETIREMENT FUND, a common :
trust fund, :

Plaintiff/Appellee, :

v. :

Case No. 920724CA

PRICEVIEW, LTD., a Utah :
limited partnership; PRICE :
K.M., a Utah limited :
partnership; FRANZ C. :
STANGL, III, individually :
and as Personal Representa- :
tive of the Estate of :
ELIZABETH ANN STANGL; and :
JOHN DOES 1 THROUGH 20, :

Defendants/Appellants. :

(Priority No. 15)

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
CARBON COUNTY, STATE OF UTAH

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FILED

Utah Court of Appeals

AUG 20 1993

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

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Defendants/Appellants. :
:

REPLY BRIEF OF APPELLANTS

SUMMARY OF ARGUMENT

The issues of practical construction and latent ambiguity continually were raised with the trial court by Defendant Franz C. Stangl, III and the other Defendants ("Stangl") and are reflected in the testimony proffered by Stangl. These issues permeated the case and are central to the decision at hand. Although Stangl did not specifically refer to the doctrines of practical construction or latent ambiguity by their formal names, the lack of a specific reference to the formal name does not preclude Stangl from citing to those doctrines on appeal. General reference to the legal principles underlying a legal doctrine sufficiently preserves the relevant issues. Appellate courts uniformly adhere to this principle.

Parol evidence is allowed to explain the meaning of documents when both parties to a contract demonstrate a different interpretation and understanding by their actions. The doctrine of practical construction is an exception to the parol evidence rule. Once the parties demonstrate by their actions that to them the contract has a particular meaning, the intent of the parties will be enforced and parol evidence is admitted. In order to enforce the intent of the parties, it is necessary for the court to hear all extrinsic evidence.

Stangl is neither estopped from asserting the ultra vires defense nor did the legislature ratify the transaction. The principles of waiver and estoppel cannot be applied to circumvent stated legislative intent and policy. A contract which violates a statute is void ab initio and cannot be ratified or approved in any manner so as to create an enforceable liability.

In addition, the amendment of the statute did not act so as to ratify the transaction. The amendment to the statute affected the substantive rights of the parties and specifically enlarged the rights and duties of Plaintiff Utah State Retirement Board, as trustee of the Utah State Retirement Fund, ("Fund") by allowing it to invest in a broader range of mortgages. The statutory amendment did much more than merely affect the legal machinery by which the Fund's rights and duties are determined. Accordingly, the statute cannot be applied retroactively.

The Fund has failed in any meaningful way to defend against Stangl's argument that the trial court improperly awarded compound interest. Compound interest is not allowed unless the parties expressly agree to it because of its extremely onerous effect. The

Fund has failed to demonstrate that the parties expressly agreed to compound interest and, accordingly, the award of compound interest is clearly improper.

ARGUMENT

I.

THE ISSUES ON APPEAL WERE SUFFICIENTLY RAISED BEFORE THE TRIAL COURT

The Fund asserts that Stangl failed to argue to the trial court the doctrine of practical construction and that the transaction documents contain a latent ambiguity. The Fund has ignored or overlooked numerous references to these doctrines in the record below and attempts to raise a procedural scapegoat to avoid facing the merits of these issues. The issues of practical construction and latent ambiguity continually were raised before the trial court, and are reflected by the testimony proffered by Stangl. These issues permeated the trial and are central to the decision at hand.

In James v. Preston, 746 P.2d 799 (Utah Ct. App. 1987), this court held that "[a] matter is sufficiently raised if it has been submitted to the trial court and the trial court has had the opportunity to make findings of fact or law." Id. at 801. In the present case, Stangl persistently raised the issues of practical construction and latent ambiguity with the trial court. Judge Bunnell ruled on these issues by not allowing the introduction of any parol evidence and by rejecting Stangl's arguments that this evidence should have been admitted. Accordingly, Stangl sufficiently raised the issues of practical construction and latent ambiguity because the Court had the opportunity to rule on these

issues. Moreover, it is irrelevant that Stangl did not specifically refer to these doctrines by their formal names.

The lack of a specific reference to the formal name of the doctrine does not preclude Stangl from citing to that doctrine on appeal. General reference to the legal principle(s) underlying the doctrine sufficiently preserves the relevant issues. Appellate courts uniformly adhere to this principle. In Danes v. Automobile Underwriters, Inc. 307 N.E.2d 902 (Ind. Ct. App. 1974), the Indiana Court of Appeals was faced with a similar situation, although involving a statute. In Danes, the plaintiff, who was acting as guardian for her minor child, sought a declaration that a previous release of her daughter's claims against an uninsured motorist pursuant to a settlement entered into by the plaintiff be declared void. Although the plaintiff argued the release was "'void ab initio' as against public policy," the plaintiff failed to cite to an Indiana statute which specifically required that a compromise or settlement of a minor's claim is valid only when approved by the court. Id. at 903. The plaintiff first made specific reference to the statute itself in the plaintiff's appellate brief. Although the defendant insurer asserted that the citation of the statute gave rise to a new issue on appeal which was not before the trial court, the appellate court disagreed stating that the plaintiff

persistently argued that a minor's claim may not be compromised or settled without court approval Questions within the issues and before the trial court are before the appellee (sic) court, and new arguments and authorities may with strict priority be brought forward.

Id. at 905 (emphasis added).

In Wojt v. Chimaquum School Dist. No. 49, 516 P.2d 1099 (Wash. Ct. App. 1973), the Washington court similarly held that a failure specifically to cite to a statute did not preclude the appellant from bringing the statute to the court's attention during the appeal. Id. at 1103 n.4. In Wojt, the plaintiff challenged the legal sufficiency of the stated causes for his discharge from one of the defendant's schools, but failed to cite to the court a statute which required the promulgation of evaluative guidelines concerning teaching and other classroom-related performance. In holding that the plaintiff could cite to the court the statute for the first time on appeal, the court stated that the primary issue before the trial court was the legal sufficiency of the stated causes for discharge and, accordingly "[a]ll statutes and authorities which bear upon the issue of the sufficiency of the causes are therefore properly before this court." Id. (emphasis in original).

Other courts have also held that the failure to specifically cite to a statute at trial did not preclude its citation during appeal. See, e.g., Independent Nat'l Bank v. Westmoor Elec. Inc., 795 P.2d 210 (Ariz. Ct. App. 1990) (where defendant failed to cite to Arizona statute providing for set-off, the court found that defendant's general argument concerning set-off sufficiently preserved argument for appeal); Hartwell Corp. v. Smith, 686 P.2d 79 (Idaho Ct. App. 1984) (general reference to statute of limitations, but failure to specifically cite statute, did not preclude its use during appeal).

In the present case, although Stangl did not specifically cite to the doctrine of practical construction, Stangl did persistently

argue that theory to the trial court. Counsel for Stangl asserted that the conduct of the parties created an ambiguity in the partnership agreement and transaction documents that did not exist on the face of the documents, and that parol evidence, thus, should be received. During the trial, Stangl proffered testimony from both himself and Butch Johnson that the parties had treated the transaction as an equity transaction and not a loan transaction. As more fully set forth in Appellant's prior brief, Mr. Johnson testified as follows:

Q: Subsequently to that point, Mr. Johnson, if you know, how did the State Retirement Fund carry the Creekview Property on their books? Was it treated as a loan or equity or both or do you know?

A: It was treated as an equity.

(Trial Transcript of January 30, 1991 (emphasis added)).

Counsel for Stangl further questioned William Chipman, Mr. Johnson's successor at the Fund, about the Fund's characterization of the transaction between the parties. The court sustained an objection to the question, stating:

Objection sustained. I do that on the ground what his category or even the Fund's category of treatment as far as their internal operation is concerned does not change the legal obligations on the parties as reflected by the documents they executed.

(Trial Transcript of January 30, 1991 at 236-37 (emphasis added)).

Because Stangl continually attempted to introduce evidence on the issue of the parties' treatment and conduct with respect to the transaction, and asserted that this evidence created an ambiguity thus allowing parol evidence, Stangl has sufficiently preserved the issue of the doctrine of practical construction for this appeal,

regardless of whether Stangl specifically cited to the trial court the formal name of the doctrine.

In addition, the issue of latent ambiguity was sufficiently raised at trial. As Stangl testified at trial, it simply did not make sense that he would contribute \$500,000 to a partnership for a 20% interest and assume personal responsibility for a \$4.35 million dollar loan, while at the same time, the Fund contributed \$100.00 for an 80% interest in the partnership and assumed no risk with respect to the loan. Such a construction of the agreements would produce an absurd result. As testified to by Stangl during his proffer:

I was not willing to pay for 100% of the debt of an empty shopping center to a partner, who's the lender, and get back nothing but paid receipts, and in the end have to give them 80 percent ownership in the property that I had to pay for. It was never part of the bargain; it was never negotiated. It never entered my mind in any way that that was going to be required to do so.

(Trial Transcript of January 30, 1991 at 77.)

Accordingly, because Stangl argued that the conduct of the parties created an ambiguity and that the effect of these documents, as now read by the Fund, would produce an absurd result, the issue of latent ambiguity was preserved for appeal.

II.

THE DOCTRINE OF PRACTICAL CONSTRUCTION IS AN EXCEPTION TO THE PAROL EVIDENCE RULE

As set forth in Stangl's prior brief, parol evidence is allowed to explain the meaning of documents when both parties to the contract demonstrate a different meaning by their actions. See, e.g., Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah

1972); Bullough v. Sims, 400 P.2d 20 (Utah 1965); EIE v. St. Benedicts Hosp., 638 P.2d 1190 (Utah 1981). The Fund, however, asserts that the doctrine of practical construction does not allow parol evidence and that these rules are "mutually exclusive." Brief of Appellee, p. 12. As stated by the Fund, "[e]ven if a court were to apply the doctrine of practical construction, the parol evidence rule would still exclude extrinsic evidence of contemporaneous conversations, representations, or statements of what the parties intended, thought, believed or understood concerning the interpretation or the purpose of the writings. Courts applying the doctrine of practical construction may only consider the parties' post-execution actions and performance." Brief of Appellee, p. 13 (emphasis in original). The Fund appears to have twisted the doctrine of practical construction so as to completely nullify its effect and has offered no support for this assertion.

The doctrine of practical construction is an exception to the parol evidence rule, and once the court applies the doctrine, parol evidence is received. That is the express purpose of the doctrine. As set forth in EIE v. St. Benedict's Hosp., 638 P.2d 1190 (Utah 1981), once the parties demonstrate by their actions that to them, the contract has a particular meaning, "the intent of the parties will be enforced." Id. at 1195 (emphasis added) (citing Bullfrog Marina v. Lentz, 501 P.2d 266, 271 (Utah 1972); Bullough v. Sims, 400 P.2d 20, 23 (Utah 1965)). In order to enforce the "intent" of the parties, it is necessary for the court to hear all relevant extrinsic evidence.

Moreover, the doctrine of practical construction will not bring the commercial world to its knees as the Fund seems to suggest. Inherent within the doctrine of practical construction is a requirement that the party asserting the doctrine show through conduct and actions that to the parties involved the contract meant something different. Accordingly, there is the built-in safeguard of the applicable burden of proof.

As the Fund suggests, parties must be assured their contracts will be enforced by the courts, but their enforcement should be in the same manner the parties have conducted themselves and not in accordance with a contrived reading of the agreement. One party to a contract should not be permitted to hide behind a newly feigned contractual interpretation when that party knows very well, and has acted as if, the provision means something quite different. This is the precise purpose for the doctrine of practical construction.

In the present case, Stangl attempted to introduce evidence regarding the conduct and intent of the parties, but was precluded from doing so by the trial court. Although the Fund strenuously objected at trial to the introduction of any of this evidence, the Fund now appears to be arguing their case and proffering evidence in their brief that was neither offered nor received at trial, which supposedly supports their position that the conduct of the parties would not require a different reading of the agreement.

The Fund also asserts that Stangl's briefs demonstrate an uncertainty regarding the purpose of the transaction and that there is an inconsistency in the briefs. There is no inconsistency in Stangl's briefs. The briefs, however, point to and emphasize different reasons why the transaction was structured in the manner

it was. The transaction was evidenced by loan agreements to enable the Fund to acquire an ownership interest in an income-producing property and to provide Stangl with certain tax benefits.

As Stangl testified, the "loan" documents were used merely as a "scorekeeping method" for the Fund. Stangl had no objection to structuring the transaction in this manner because it provided him with certain tax benefits. Although these tax benefits were of value to him, they did not offset, as the Fund suggests, any disproportionate allocation of interest and risk. Under the Fund's scenario, Stangl contributed to the partnership property worth \$500,000 and received a 20% interest, while at the same time the Fund contributed only \$100 and a promise to make a loan and received an 80% interest. Under this scenario, Stangl also assumed sole liability for the loan. Whatever the tax benefits may have been from structuring the transaction as a loan, they do not offset instantly giving away \$400,000 of value and assuming sole liability for a \$4.35 million loan.

In addition, the Fund asserts that Stangl's briefs leave many questions unanswered, such as what conduct of the Fund after the closing is inconsistent with the documents; where is the ambiguity; what is the relevance of the Fund's 80% ownership in the Partnership; why does Stangl believe that the notes and guarantees are unenforceable; and why does Stangl believe that the notes do not need to be repaid simply because the Fund owned 80% of the partnership. Brief of Appellees, p. 22. These questions, however, have been answered.

After signing the agreements, the Fund continued to book the transaction and the Fund's investment as equity. The Fund also

made this representation to its auditors. In addition, Mr. Johnson, who was a former employee of the Fund and responsible for this agreement, testified that the Fund treated its investment as an equity investment. The Fund also excused Stangl from making the "payments" for a seven month period, with no penalty or adverse action taken against him. The ambiguity arises because of the parties' treatment of the transaction as an equity investment, while the documents on their face treat the transaction as a loan. The Fund's 80% ownership in the Partnership further supports Stangl's position that the Fund had made an equity investment. Otherwise, the Fund would instantly receive an 80% interest in property worth \$500,000 for only making a loan. Finally, the notes are unenforceable and do not need to be repaid because of the doctrine of practical construction. The parties, by their actions and conduct, have shown that to them the contract meant something completely different.

An appellate brief, however, is neither the place nor the vehicle to introduce new evidence or to make factual arguments. The proper place is an evidentiary hearing. Accordingly, this Court should remand this case to the trial court to hear all of the evidence relative to the conduct of the parties so that the meaning and intent of the parties may be established.

III.

THE LOAN AGREEMENT CONSTITUTED AN ULTRA VIRES ACT BECAUSE IT WAS BEYOND THE SCOPE OF THE FUND'S AUTHORITY

The Fund's supposed defenses to the ultra vires issue, that Stangl is estopped from asserting the ultra vires defense and that the legislature ratified the "loan" transaction, are shams and

are unsupported by the case law. The Fund cites Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551 (Ariz. 1971), in support of its estoppel argument. The Fund quotes from this case that "'[i]t would be grossly unfair to all concerned to allow the Town to idly sit back and reap the benefits of its bargain without requiring it to pay accordingly.'" Brief of Appellees, pp. 35-36 (quoting Town of Gila Bend, 490 P.2d at 558). However, the Fund has grossly taken this quote out of context and has misstated the holding of the case. Immediately following the Fund's quote, the court in Gila Bend stated:

Relative to the contention that estoppel and waiver cannot be used to prevent the Town from asserting the illegality of a contract, we agree. In the instant case, however, the agreement was not illegal.

In a proper case, the principles of waiver and estoppel cannot be applied to circumvent stated legislative intent and policy, nor can a contract which violates A.R.S. § 42-303, subsec. D and is, therefore, void ab initio be ratified or approved in any manner by defendant or its officers or any other person so as to create an enforceable liability.

Id. at 558 (emphasis added).

The Fund's ratification argument similarly has no merit. The Fund cites Washington Nat'l Ins. Co. v. Sherwood Assoc., 795 P.2d 665 (Utah Ct. App. 1990), for the proposition that "'a statute may be applied retroactively if it affects only procedural and not substantive rights.'" Brief of Appellee, p. 37 (quoting Washington Nat'l, 795 P.2d at 667). The Fund, however, provides no argument or authority as to whether the statutory amendment in this case is procedural or substantive. As set forth in Washington Nat'l,

"[s]ubstantive law is defined as the positive law which creates, defines and regulates the

rights and duties of the parties and which may give rise to a cause of action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective."

795 P.2d at 669 (quoting Petty v. Clark, 192 P.2d 589, 593-94 (Utah 1948)). The Washington Nat'l court further stated that "[i]f a statutory amendment changes the contractual rights and obligations of the parties, it is substantive." Id. at 669.

In the present case, the statute created, defined and regulated the rights and duties of the Fund by setting forth the investments which it could make. The amendment in this case specifically enlarged the rights and duties of the Fund by allowing it to invest in a broader range of mortgages. The statutory amendment does much more than merely affect the legal machinery by which the Fund's rights and duties are determined. The statutory amendment is substantive and not procedural, and therefore, the statute cannot be applied retroactively.

As set forth in Stangl's prior brief, a court should make every attempt to interpret a document in order to give it legal effect. Stangl v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976). In order to give legal effect to the subject documents in this case, the Court must construe them in accordance with the intentions and conduct of the parties, which was an equity investment.

IV.

THE TRIAL COURT ERRED IN AWARDING COMPOUND INTEREST

The Fund has failed in any meaningful way to oppose Stangl's argument that the trial court improperly awarded compound interest. Instead, the Fund states that the compound interest issue was

addressed in the prior briefs in the first appeal and that "there exists no reason to rehash that issue again." Brief of Appellee, p. 38. The simple fact is that compound interest is not allowed unless the parties expressly agree to compound interest. See Mountain States Broadcasting Co. v. Neale, 776 P.2d 643, 647 (Utah Ct. App. 1989). The reason for this requirement is the extremely onerous effect compound interest can have. As an example, the difference in interest between simple and compound interest in this case would be in excess of \$300,000.00. The Fund has failed to distinguish the Mountain States case or to show how the parties expressly agreed to compound interest in the present case. Accordingly, the award of compound interest is improper and the case must be remanded for a determination of the proper amount of interest calculated on a simple interest basis.

CONCLUSION

Based on the arguments contained in this Brief, Stangl's initial brief filed on October 28, 1992 and the Brief of Appellant and Reply Brief of Appellant filed March 28, 1991 and June 17, 1991, respectively, defendants respectfully request this Court to reverse and remand with the following instructions to the trial court: (1) to receive and consider evidence of the parties' intent in entering the partnership agreement and loan document; (2) to apply the law concerning the legality of the loans; (3) to change the interest on any judgment entered to simple interest; (4) to order the entry of a satisfaction of the summary judgment so that there are no duplicate judgments against Stangl; and (5) to order

Judge Bunnell to recuse himself from further trial or pre-trial proceedings in the case.

Respectfully submitted this 20th day of August, 1993.

CAMPBELL MAACK & SESSIONS

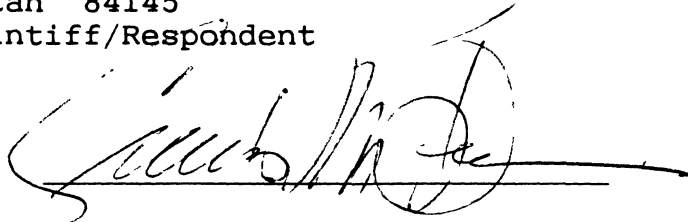
A handwritten signature in dark ink, appearing to read 'Clark W. Sessions', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'C'.

CLARK W. SESSIONS
DEAN C. ANDREASEN
ROBERT E. MANSFIELD

CERTIFICATE OF SERVICE

On this 20th day of August 1993, I hereby caused to be hand-delivered, two true and correct copies of the foregoing Reply Brief of Appellants to the following:

R. Stephen Marshall, Esq.
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50 South Main Street, Suite 1600
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Attorneys for Plaintiff/Respondent

A handwritten signature in black ink, appearing to read "R. Stephen Marshall", is written over a horizontal line.