Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1983

Russell Acton, Andrew Acton And Carol E. Acton v. J. B. Deliran, A Utah Corporation; Gerald House; Era Realty Center; Daryl Yates And Marydon Yates : Brief of Defendant-Respondent And Cross-Appellant Era Realty Center

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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.Hans Q. Chamberlain; Attorney for Defendant Respondent and Cross-Appellant ERA Realty Center

Recommended Citation
Brief of Respondent, *Acton v. Deliran*, No. 19300 (1983).
https://digitalcommons.law.byu.edu/uofu_sc2/4749

This Brief of Respondent 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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON and CAROL E. ACTON, Plaintiffs- Appellants, vs. J. B. DELIRAN, a Utah corporation; GERALD HOUSE; ERA REALTY CENTER; DARYL YATES and MARYDON YATES, husband and wife, Defendants-Respondents, and Cross-Appellants.	)	Case No. 19300

BRIEF OF DEFENDANT-RESPONDENT AND CROSS-APPELLANT
ERA REALTY CENTER

APPEAL FROM A JUDGMENT
OF THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH
HONORABLE CHRISTIAN RONNOW, JUDGE

Hans Q. Chamberlain
CHAMBERLAIN & HIGBEE
110 North Main, Suite G
Cedar City, Utah 84720
Attorney for Defendant-Respondent and Cross-Appellant ERA Realty Center

Jeffrey Oritt
PRINCE, YEATES & GELDZAHLER
Third Floor Mony Plaza
424 East Fifth South
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-Appellants

Patrick H. Fenton
154 North Main Street
Cedar City, Utah 84720
Attorney for Defendants-Respondents and Cross-Appellants J. B. Deliran and Gerald House

FILED

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON and CAROL E. ACTON, Plaintiffs- Appellants, vs. J. B. DELIRAN, a Utah corporation; GERALD HOUSE; ERA REALTY CENTER; DARYL YATES and MARYDON YATES, husband and wife, Defendants-Respondents, and Cross-Appellants.	)	Case No. 19300

BRIEF OF DEFENDANT-RESPONDENT AND CROSS-APPELLANT ERA REALTY CENTER

APPEAL FROM A JUDGMENT OF THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, STATE OF UTAH HONORABLE CHRISTIAN RONNOW, JUDGE

Hans Q. Chamberlain
CHAMBERLAIN & HIGBEE
110 North Main, Suite G
Cedar City, Utah 84720
Attorney for Defendant-Respondent and Cross-Appellant ERA Realty Center

Jeffrey Oritt
PRINCE, YEATES & GELDZAHLER
Third Floor Mony Plaza
424 East Fifth South
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-Appellants

Patrick H. Fenton
154 North Main Street
Cedar City, Utah 84720
Attorney for Defendants-Respondents and Cross-Appellants J. B. Deliran and Gerald House

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN LOWER COURT 2

RELIEF SOUGHT ON APPEAL 3

STATEMENT OF FACTS 3

ARGUMENT 14

POINT ONE: THE EVIDENCE CLEARLY SUPPORTS THE JURY VERDICT WHICH SPECIFICALLY ENFORCED THE CONTRACT BETWEEN THE BUYER AND THE SELLER. 14

POINT TWO: THE TRIAL COURT PROPERLY REFUSED TO GRANT PLAINTIFFS' MOTION FOR A DIRECTED VERDICT OR ITS MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT. 16

POINT THREE: THE COURT ERRED IN FAILING TO AWARD DEFENDANT ERA REALTY CENTER ATTORNEY'S FEES PURSUANT TO THE LANGUAGE OF THE EARNEST MONEY RECEIPT AND OFFER TO PURCHASE AGREEMENT. 17

POINT FOUR: THE COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES RENDERED ON BEHALF OF DEFENDANT ERA REALTY CENTER PURSUANT TO UTAH CODE ANNOTATED 78-27-56. 21

CONCLUSION 22

AUTHORITIES CITED

STATUTE:

Utah Code Ann. § 78-27-56 (1953 as amended) 2, 21, 22

CASES:

BLT Investment Company v. Snow, 586 P.2d 456 (Utah 1978) 18

Bodenhamer v. Patterson, 278 Or. 367, 563, P.2d 1212 (Or. 1977) 18

Cady v. Johnson, 671 P.2d 149 (Utah 1983) 22

Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967) 17

Usinger v. Campbell, 280 Or. 751, 572 P.2d 1018 (Or. 1977) 19

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON and CAROL E. ACTON, Plaintiffs- Appellants, vs. J. B. DELIRAN, a Utah corporation; GERALD HOUSE; ERA REALTY CENTER; DARYL YATES and MARYDON YATES, husband and wife, Defendants-Respondents, and Cross-Appellants.	)	Case No. 19300

BRIEF OF DEFENDANT ERA REALTY CENTER, RESPONDENTS AND CROSS-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

The action filed by Plaintiffs sought to have a certain real estate contract entered into between Plaintiffs and Defendant J. B. Deliran rescinded and to recover from Defendants-Respondents J. B. Deliran, Gerald House and ERA Realty Center all payments made against the purchase price as agreed to between said parties. Plaintiffs' basis for seeking rescission was that a legal water connection did not exist on the property purchased by them. Defendant ERA Realty Center was joined as a party-defendant by Plaintiffs as the real

estate agent and was required to remain in the lawsuit and defend its position even though the Court ruled as a matter of law that it was the agent of J. B. Deliran. It was, and always has been, the position of ERA Realty Center that it should not have been named as a party-defendant, that Plaintiffs' Complaint, Amended Complaint and Second Amended Complaint failed to seek any affirmative relief from said Defendant, and that by reason of the same, ERA Realty Center is entitled to an award of attorney's fees under (1) the language of the Earnest Money Agreement and (2) pursuant to Utah Code Annotated 78-27-56.

DISPOSITION IN LOWER COURT

The matter was tried to a jury over a period of three days. The jury returned a verdict in favor of Defendants to the effect that the contract entered into between Plaintiffs and Defendant J. B. Deliran should not be rescinded. Thereafter, the Court (sitting without a jury) awarded Judgment in favor of Plaintiffs against Defendants J. B. Deliran and Gerald House (not against ERA Realty Center) in the sum of $16,450.00 for the reason that Deliran and House, as sellers, did not provide legal access to the subject property. The Trial Court so ordered even though Plaintiffs' Complaint failed to state any claim for damages by reason of non-access. Furthermore, Plaintiffs failed to move to amend their Complaint pursuant to

Rule 15 (b) of the Utah Rules of Civil Procedure at any time concerning damages incurred by reason of non-access to the subject property. Absolutely no testimony was offered at the jury trial concerning non-access to the property.

The Court also denied the request of all Defendants to an award of attorney's fees, even though they prevailed at the jury trial whereby the contract sought to be rescinded by Plaintiffs was in fact upheld.

RELIEF SOUGHT ON APPEAL

Defendant ERA Realty Center seeks to have the jury verdict affirmed and to reverse the District Court's Judgment denying an award of attorney's fees to Defendant ERA Realty Center, including attorney's fees rendered on appeal, and to remand the matter to the District Court for purposes of taking additional proof concerning attorney's fees.

STATEMENT OF FACTS

On or about November 12, 1980, Daryl Yates and Marydon Yates, who were the then owners of the subject property, listed the same with ERA Realty Center with an asking price of $29,900.00 (Exhibit 1). Defendant J. B. Deliran purchased from Yates the subject property for the sum of $17,018.87 on April 19, 1981, pursuant to an Earnest Money Receipt and Offer to Purchase Agreement (Exhibit 2). On May 15, 1981, J. B. Deliran listed the subject property with ERA Realty Center with an

asking price of $27,500.00 (Exhibit 4). The Yates listing agreement states "water in building", while the Deliran listing indicates that city water is not available. Plaintiffs and Defendant Deliran entered into an Earnest Money Receipt and Offer to Purchase Agreement for the subject property on July 16, 1981, with a purchase price of $23,800.00 (Exhibit 5). The closing of the transaction, however, did not take place until August 12, 1982. By reason of that sale, Defendant ERA Realty Center earned a commission which was paid at the time of closing.

In February of 1981, and while the property was listed by Yates with ERA Realty Center, Appellant Andrew Acton inquired concerning the subject property, but did not purchase the same. At that time, Andrew saw the Yates listing agreement which stated "water in building." In June of 1981, and after the property had been purchased by J. B. Deliran and relisted with ERA Realty Center, Andrew again made inquiry, went to the subject property and observed water running from a frost-free spigot. The water from the spigot actually came from the adjacent property owned by Wayne Smith. At some time in the past, the Smith water line had been extended underground to the subject property. Thereafter, and prior to closing, Plaintiffs again visited the subject property and were accompanied by Robert Behunin, the Cedar City Building Inspector. While

Plaintiffs claim there is some dispute as to what Behunin told Plaintiffs concerning the availability of water, the record speaks for itself:

Direct Examination of Behunin by Scott Thorley, Attorney for Plaintiffs.

Q. Okay. Did you have any conversations as you went outside the building concerning water?

A. Yes. As we left the building, we were talking about water meters, and we vaguely looked for a water meter, we couldn't find one and I left and I stated if there wasn't a water connection, they'd (sic) have to pay for a connection.

Q. Okay. And by that, were you referring to a water meter?

A. Yes. A legal connection to the water system.

Q. Did you ever tell these people that the water connection in this building was illegal?

A. I don't know if I specifically told them at that time that the water connection in that building was illegal. I did tell them that I felt there wasn't a meter -- there wasn't a meter there, and they would have to pay for a connection.

Q. And they'd have to pay for a connection and water meter?

A. Right. (Tr. 408). (Emphasis added).

Cross-Examination of Behunin by Hans Q. Chamberlain, Attorney for Defendant ERA Realty Center.

Q. All right. Mr. Behunin, do you recall in your deposition, testifying that -- if there was a water meter there, that it would be out by the street, if not, then they'd (sic) have to go in and see Bud Bauer; did you tell --

A. Yes.

Q. Did you testify?

A. Yes.

Q. Did you tell the Actons that on the occasion you visited the property?

A. Yes. We -- that's when we were out in front talking about water meters.

Q. That they needed to go in and see Bud Bauer?
A. Yes. (Tr. 420).

Bud Bauer was the Superintendent of the Cedar City Municipal Water System.

The above quoted testimony is only one of many instances prior to closing where Plaintiffs became aware that the water flowing from the frost-free spigot on the property may not be coming from a legal water connection, and that they needed to make inquiry of Bud Bauer, the Superintendent of the Cedar City Water Department. Plaintiffs in fact failed to make inquiry of Mr. Bauer prior to closing as to whether or not the water connection was legal and what it would cost to purchase a water meter from Cedar City Corporation.

Prior to closing, Plaintiffs engaged the services of David Grimshaw to survey the subject property. The survey prepared by David Grimshaw (Exhibit 6) makes reference to the location of a sewer connection, but fails to indicate that a water meter was discovered during the course of the survey work. The survey map was delivered by Grimshaw to Plaintiffs prior to closing. A review of the Grimshaw testimony clearly indicates

that Plaintiffs were put on notice by Wayne Smith, the owner of the water connection, that water did not go with the property, that the water connection belonged to him, and that they should make inquiry concerning the availability of another water connection.

Direct Examination of David Grimshaw by Hans Q. Chamberlain.

Q. How long were you on the property conducting this survey?

A. Total, probably 4 hours.

Q. And who assisted you on that day?

A. Russell Acton.

Q. All right. And he's the gentleman in the courtroom today?

A. Yes. That's why the letter is addressed to Russell.

Q. To Russell?

A. Yes.

Q. All right. On that day, did you see Mr. Wayne Smith?

A. Yes.

Q. Did you know who Wayne Smith was before that day?

A. Yes.

Q. All right. Were you present on that day at a time when there was a conversation between Mr. Wayne Smith and Mr. Act -- or Russell Acton, over which you -- which you were a party to concerning the water that was on the property being surveyed?

A. Yes.

Q. All right. And would you tell us, Mr. Grimshaw, whose spoke and what was said at that time?

A. Wayne Smith explained the water on the lot was an illegal connection, did not belong with the lot. He explained other things pertaining to the lot that he has already said here today. .... (Tr. 486-487). (Emphasis added).

Direct Examination (continued).

Q. All right. What specifically did he say, if you recall, to the best of your memory, concerning water?

A. I don't remember the exact words, other than he did point out that the water did not go with the lot. .... (Tr. 488).

Direct Examination (continued).

Q. All right. Now, I note in your letter to Mr. Russell Acton dated August 1, 1981, that you do not state anything about water; is there a reason why you didn't put anything in concerning the water?

A. Because Wayne Smith had explained there was no water on the lot.

Q. And he explained that to Russell Acton; is that correct?

A. And to myself, yes. (Tr. 488).

Mr. Wayne Smith owned the property adjacent to the subject property and likewise was the owner of the water connection which extended off his line and onto the property in question. (Tr. 467). Mr. Smith's testimony is consistent with that of the testimony given by Mr. Grimshaw, but is perhaps more explicit concerning the fact that Plaintiffs were put on actual notice that the water did not go with the property. Mr. Smith

testified that he was present when the property was being surveyed by Mr. Grimshaw on or about August 1, 1981. (Tr. 467-468).

Direct Examination of Mr. Smith by Hans Q. Chamberlain.

Q. All right. All right, and was there a conversation -- well, let me ask, what was (sic) Mr. Acton and Mr. -- Mr. Russell Acton and Mr. David Grimshaw doing? What did you observe them doing?

A. They were trying to locate boundaries for the property where the lines were.

Q. At that time, Mr. Smith, did you have a conversation with them or did you direct any conversation towards Mr. Russell Acton and in the presence of David Grimshaw concerning the water that was located upon the Yates property?

A. We talked --

Q. Did you have a conversation?

A. We talked about several things and I think the water was one we talked about, yes.

Q. All right. And at the time you talked about the water, would you state in substance and effect what you said to Mr. Russell Acton in the presence of David Grimshaw concerning the water?

A. Mentioned that the water, that particular hydrant on the property, that really it wasn't a legal connection.

Q. Wasn't an -- wasn't a legal connection?

A. Right.

Q. All right. And what else did you tell them about the water?

A. Basically, I -- we talked several times and they asked me some questions about where the water lines were at different periods, and I really

don't recall on any particular day, you know, it is my testimony; but what I did say, but what I did note it -- make note that there was a problem with the water connection.

Q. What did you tell them the problem was?

A. Well it wasn't metered, it came off our meter and it wouldn't be -- they couldn't continue to do that, it wasn't a legal connection to do that. (Tr. 468-469). (Emphasis added).

Mr. Smith, in response to cross-examination by Plaintiffs' counsel stated:

Cross-Examination of Smith by Scott Thorley.

Q. But what you're saying is that during one of the several conversations that you had, you discussed that the water wasn't metered going into the Yates property; is that correct?

A. I told them it came across my ground and it wasn't a legal connection, they'd have to solve that. (Tr. 476).

Both Mr. Grimshaw and Mr. Smith testified after Plaintiff Russell Acton had testified. Of significance is the fact that on cross-examination, Mr. Acton gave the following testimony before Smith and Grimshaw testified:

Cross-Examination of Russell Acton by Hans Q. Chamberlain.

Q. Let me do it this way, Mr. Acton: Do you deny that Wayne Smith told you on August 1, 1981, that the water connection was illegal? Do you deny that?

A. I do not recall the conversation that it was illegal.

Q. Don't recall it?

A. No sir.

Q. Convenient memory?

A. No sir.

Q. Do you deny that Wayne Smith told you the water did not go with the property? Do you deny he told you that?

A. I do not recall it. (Tr. 297-298).

Even though Plaintiffs had been put on notice by Mr. Behunin and Mr. Smith that a legal water connection did not exist, Plaintiffs elected to close the transaction without making further inquiry. Only after the closing of the transaction did Plaintiffs make inquiry of Bud Bauer, the Water Superintendent for Cedar City Corporation. Mr. Bauer only confirmed what Plaintiffs had earlier been told by Mr. Smith, to-wit, that the water connection was in fact an illegal connection and that Plaintiffs could not continue to use it.

Plaintiffs thereafter requested that the seller, J. B. Deliran, rescind the sale, but Mr. House, on behalf of said entity, refused to do so. Plaintiffs then contacted Audry Lebbon, the salesperson for Defendant ERA Realty Center to see what could be done. Nancy Hale, another salesperson for ERA Realty Center, was a participant in the conversation held at the real estate office and testified that since Mr. Behunin was a very efficient man, she couldn't imagine him not telling

3. For an Order of this Court suspending payments on the contract during the pendency of this action and thereafter.

4. For the cancellation of said agreement to purchase.

5. For an award of reasonable attorney's fees incurred in this lawsuit.

6. For such other and further relief as the Court deems just and proper.

Defendant J. B. Deliran cross-claimed against ERA Realty Center requesting indemnifcation in the event the Plaintiffs prevailed. However, pursuant to the motion of Defendant ERA Realty Center, the Court severed for purposes of trial said Cross-Claim. Thereafter, Defendant ERA Realty Center moved to dismiss on the basis that (1) said Defendant was not a proper party to the action (2) that ERA Realty Center was the agent of the seller, J. B. Deliran and (3) that Plaintiffs had not alleged any legal theories which would make ERA Realty Center individually liable. That motion was denied by the Court over the strenuous objection of Defendant ERA Realty Center, and said Defendant was put to the expense of a three day jury trial when in fact no liability would have attached to ERA Realty Center if Plaintiffs had prevailed.

ARGUMENT

I. The evidence clearly supports the jury verdict which specifically enforced the contract between the buyer and the seller.

The primary issue of the three day jury trial was whether Plaintiffs had either actual or constructive notice that the property in question did not contain a legal water connection. Appellants would have this Court believe that the evidence is so overwhelming in their favor that to hold otherwise would be a manifest injustice. While Plaintiffs may have testified that they did not have notice of the defective water connection, the record is replete with testimony from independent witnesses which persuasively contradict that position. Russell Acton, a party litigant interested in the outcome of the litigation indicated on cross-examination that he could not recall statements made to him by Wayne Smith, in the presence of the surveyor, David Grimshaw, (1) that the water connection was illegal, (2) that the water connection belonged to Smith, and (3) that they (meaning Plaintiffs) would have to do something about it. Smith and Grimshaw were called as independent third-parties to describe a conversation which directly focused in on the issue of notice, both actual and constructive. Smith clearly testified that he told Russell Acton that (1) the hydrant (meaning the frost-free spigot) on the property wasn't a legal connection, (2) that there was a problem with the water connection, (3) that the connection wasn't metered, (4) that it came off Smith's meter and (5) that the Actons would have to solve those particular matters. (Tr. 469-476). David

Grimshaw, an individual hired by Plaintiffs to conduct a survey testified that Mr. Smith explained to Plaintiff Russell Acton that the water on the lot was an illegal connection and "did not belong with the lot". (Tr. 487). Furthermore, the conversation between Robert Behunin and Plaintiffs would have placed a reasonable man on constructive notice that there was a potential problem concerning the source of the water coming from the frost-free spigot for the reason that he told them there was no meter and that a meter must be purchased to establish a "legal water connection" (Tr. 408).

For Appellant to state that none of the witnesses called by Defendant contradicted or rebutted the testimony of Plaintiffs is simply a misstatement of the facts. The testimony produced by Defendants not only rebutted the position maintained by Plaintiffs, but was so clear that a jury elected to accept the testimony offered by Defendants and reject the testimony of Plaintiffs. Such is the prerogative of a jury.

II. The trial court properly refused to grant Plaintiff's motion for a directed verdict or its motion for a judgment notwithstanding the verdict.

In Utah the law is well established that the trial court should only grant a directed verdict or a judgment notwithstanding the verdict when all of the testimony and all reasonable inferences flowing therefrom which tend to prove Plaintiffs' case be accepted as true, and all conflicts and all

evidence which tend to disprove it be disregarded. Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (Utah 1967).

In the instant case, the Court simply recognized that while there was conflicting evidence, the credibility of the witnesses was at issue and that the trier of fact can choose to accept the testimony of one witness over the other. The testimony outlined above convincingly indicates that there was substantial evidence for the jury to find in favor of Defendants and against Plaintiffs.

III. The Court erred in failing to award Defendant ERA Realty Center attorney's fees pursuant to the language of the Earnest Money Receipt and Offer to Purchase Agreement.

It is the position of Defendant ERA Realty Center that it was privy to the Earnest Money Agreement entered into between Plaintiffs and Defendant J. B. Deliran, and by reason of the same, since the seller, J. B. Deliran, and its agent, ERA Realty Center, prevailed at the time of trial, they should be entitled to a reasonable attorney's fee rendered in the defense of this action. The Earnest Money Agreement (Exhibit 5) states at line 47:

> If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee. (Emphasis added).

It should be understood that Plaintiffs action sought to rescind the contract. It is clear that had the jury rescinded

the contract as Plaintiffs alleged, Plaintiffs would not have been entitled to an award of attorney's fees. In BLT Investment Company v. Snow, 586 P.2d, 456 (Utah, 1978), the Court adopted the position articulated in the case of Bodenhamer v. Patterson 278 Or. 367, 563 P.2d 1212 (Or., 1977), and stated:

> "Finally, Pattersons contend that the trial court erred in denying their request for attorney's fees. This was not error. The claim for attorney's fees is based upon a provision in the contract of sale. By asking for rescission of the contract they disaffirmed it in its entirety. They may not avoid the contract and, at the same time, claim the benefit of the provision for attorney's fees." (At page 458).

By Plaintiffs attempt to rescind the contract, all Defendants joined by Plaintiffs were put to the test to specifically enforce the contract for the following reasons:

1. Defendant J. B. Deliran wanted the contract specifically enforced so that the sale was completed and a profit made.

2. Defendant ERA Realty Center wanted the contract specifically enforced since it earned a commission in handling the sale, and if the contract were rescinded by jury verdict, ERA Realty Center would have to return to J. B. Deliran the commission it made of ten percent of the sale price. (See line 49 of the Earnest Money Agreement, Exhibit 5, which provides for a commission of 10%).

The Court ultimately ruled as a matter of law, and so instructed the jury, that ERA Realty Center was the agent of J. B. Deliran, and any act committed by ERA Realty Center was ultimately the act of J. B. Deliran. Therefore, for all intents and purposes, said Defendants became one and the same. Thus, if this Court finds that J. B. Deliran is entitled to recover its attorney's fees because it is a party to the contract, then likewise, Defendant ERA Realty Center, as its agent (but named as a separate Defendant by Plaintiffs) shall also be entitled to that same privilege. Furthermore, a review of the Earnest Money Receipt and Offer to Purchase Agreement indicates that ERA Realty Center signed the contract as the agent for J. B. Deliran. The signature of ERA Realty Center made it a party to the action for purposes of receiving a commission by bringing Plaintiffs and Defendant J. B. Deliran together. The very act by Plaintiffs in seeking to rescind the contract required ERA Realty Center to seek to enforce said contract so that it would ultimately receive the commission generated by the sale.

The case of Usinger v. Campbell, 280 Or. 751, 572 P.2d 1018 (Or. 1977), supports the position taken by Defendant ERA Realty Center. In Usinger, the purchaser brought suit against the seller for specific performance of an Earnest Money Agreement. The lower court denied specific performance of the

contract and dismissed purchaser's complaint but awarded the seller, as the prevailing party, attorney's fees pursuant to the provision for such found in the Earnest Money Agreement. The court stated:

> Plaintiffs finally argued that Defendant should not have been awarded attorney's fees. The Earnest Money Agreement specifically provided for such fees. Plaintiffs argue, however, that Defendant "elected to rescind the Earnest Money Agreement," thus bringing the case under the rule of Pickinpaugh v. Morton, 268 Or. 9, 519 P.2d 91 (1974). Pickinpaugh is distinguishable from the case at bar. In that case Plaintiff came into court seeking a rescision of the contract. The trial court allowed rescision and this court affirmed. We relied upon 3 H. Black Rescission and Cancellation §583 (1960) for the proposition that Plaintiff could not assert that the contract should be rescinded and at the same time rely on a provision therein for the recovery of attorney's fees. In this case, the Plaintiffs contend there was a contract and asked for specific performance. This requires the Defendant to come into court and defend, also relying on the contract by stating that it was not performed in accordance with its terms. Defendant does not disaffirm the contract but relies on the exact terms thereof. Therefore, the provision in the contract providing for attorney's fees applies. (Emphasis added).

If Plaintiffs were ever justified in naming ERA Realty Center as a separate Defendant, it had to be on the basis that ERA Realty Center was a party to the Earnest Money Receipt and Offer to Purchase Agreement. If that is the case, then ERA

Realty Center, as a prevailing party, is entitled to its attorney's fees based on the language of the contract.

IV. The Court erred in failing to award attorney's fees rendered on behalf of Defendant ERA Realty Center pursuant to Utah Code Annotated 78-27-56.

On or about May 5, 1982, Plaintiffs filed their Second Amended Complaint naming J. B. Deliran, a Utah corporation, Gerald House, and ERA Realty Center as Defendants. Plaintiffs' original Complaint also named ERA Realty Center as a Defendant. The prayer in Plaintiffs' Second Amended Complaint requested relief for both damages as well as rescission, but they were not plead in the alternative. The importance of this argument is the fact that none of the six points in Plaintiffs' prayer for relief could be effectively granted against Defendant ERA Realty Center. Those six points are outlined above under the heading of Facts.

It would have been theoretically impossible for the Court, either by judge or jury verdict, to enter a Judgment against ERA Realty Center for damages or rescission. If Plaintiffs had prevailed, Defendant ERA Realty Center would not have been obligated to refund to Plaintiffs the purchase price paid by them. Said Defendant would only have been required to refund to the seller the commission generated by reason of its efforts pursuant to the listing agreement. Certainly ERA Realty Center could not have been ordered to pay to Plaintiffs the money

received by Defendant J. B. Deliran in the form of a down payment or for payments made by Plaintiffs on the contract of purchase. Furthermore, the Court correctly ruled as a matter of law that ERA Realty Center was the agent of J. B. Deliran and the Court ultimately submitted to the jury for deliberation only the question of rescission (not damages) based on either mutual mistake of fact or fraud. The point is, therefore, that both theories could only apply to Defendant J. B. Deliran and not to Defendant ERA Realty Center.

The pleadings clearly indicate that it has always been ERA Realty Center's position that it was not a proper party to this action primarily because Plaintiffs' Complaint had to rise or fall on the basis of the agency between ERA Realty Center and J. B. Deliran. However, Plaintiffs chose to join Defendant ERA Realty Center as a party-defendant. It is therefore Defendant ERA's position that Plaintiffs' claim was "without merit" and that Plaintiffs conduct in bringing this litigation was lacking in good faith, and by reason of the same, Defendant ERA Realty Center is entitled to attorney's fees pursuant to Utah Code Annotated 78-27-56, 1953, as amended. See Cady v. Johnson, 671 P.2d 149 (Utah 1983).

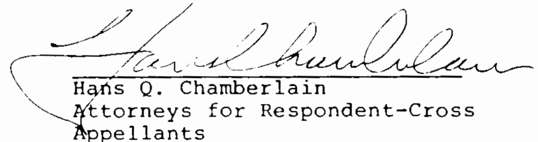
CONCLUSION

The Court should affirm the jury verdict which upheld the contract entered into between Plaintiffs and Defendant, to-wit,

the Earnest Money Receipt and Offer to Purchase Agreement. The Court should reverse the trial court's ruling which denied the request of all Defendants for attorney's fees as the prevailing party, and remand the case to the Fifth Judicial District Court for a determination of the amount of attorney's fees to be awarded to said Defendants, including those incurred as part of the appeal process.

Respectfully submitted this 17th day of February, 1984.

CHAMBERLAIN & HIGBEE



Hans Q. Chamberlain
Attorneys for Respondent-Cross Appellants

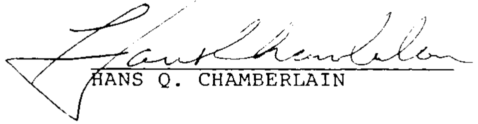
CERTIFICATE OF MAILING

On the 18th day of February, 1984, I certify that I caused to be mailed, postage prepaid, two copies of the foregoing brief of Respondents, to the following parties of record:

Jeffrey Oritt, Esq.
Attorney for Plaintiffs-Appellants
Third Floor Mony Plaza
424 East Fifth South
Salt Lake City, Utah 84111

...

Patrick H. Fenton, Esq.
Attorney for Defendants-Respondents
J. B. Deliran and Gerald House
154 North Main St.,
Cedar City, Utah 84720



HANS Q. CHAMBERLAIN