Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1970

Fred G. Jensen And Miriam D. Jensen v. Ray L. Nielsen And Mabel W. Nielsen : Appellant's Brief

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.K.L. McKiff; Attorney for Appellant

Recommended Citation
Brief of Appellant, *Jensen v. Nielsen*, No. 12160 (1970).
https://digitalcommons.law.byu.edu/uofu_sc2/5296

This Brief of Appellant 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

FRED G. JENSEN and
MIRIAM D. JENSEN,

Plaintiffs and Appellants,

vs.

RAY L. NIELSEN and
MABEL W. NIELSEN,

Defendants and Respondents.

APPELLANTS' BRIEF

On Appeal from the Sixth Judicial District [illegible]
State of Utah, in and for Garfield [illegible]
The Honorable Ferdinand Erickson, [illegible]

K. L. McIFF
MATTSSON, JACKSON [illegible]
151 North Main
Richfield, Utah
Attorney for Appellants

TIBBS & TERVORT
50 North Main
Manti, Utah
Attorneys for Respondents

FILED
DEC 7 - 1970
Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION BY THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF GARFIELD	1
NATURE OF RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	4
POINT I: THE JUDGMENT OF THE TRIAL COURT IS NOT SUPPORTED BY ITS FINDINGS	4
POINT II: THE TRIAL COURT WAS EITHER MISTAKEN IN ITS UNDERSTANDING OR REFUSED TO APPLY THE LAW OF THIS STATE ON FORFEITURES UNDER REAL ESTATE INSTALLMENT CONTRACTS	6
A. PROCEEDING OUTSIDE THE CONTRACT	6
B. DAMAGES VS. PENALTY	7
C. RELEVANCY OF VALUE	8
D. RELEVANCY OF INCOME	11
E. CLEAN HANDS	12
CONCLUSION	13

INDEX OF CASES CITED

Malmberg v. Baugh, 62 Utah 331	4, 7, 8, 12, 13
Perkins v. Spencer, 121 Utah 468	4, 5
Crofts v. Jensen, 86 Utah 13	4
Young v. Hansen, 117 Utah 591	4
Jacobsen v. Swan, 3 Ut. 2d 59	4
Cole v. Parker, 5 Ut. 2d 263	4, 5
Strand v. Mayne, 14 Ut. 2d 355	4
Christy v. Guild, 1 Utah 313	11
Freedman v. Rector of St. Mathias Parish, 230 P. 2d 629 (Cal. 1951)	8

AUTHORITIES CITED

Restatement, Contracts, Section 357, Comment (1932)	8
Bodenheimer, "Forfeitures Under Real Estate Installment Contracts in Utah" 3 Utah Law Review 30	13

In The Supreme Court of the State of Utah

FRED G. JENSEN and
MIRIAM D. JENSEN,
Plaintiffs and Appellants,

vs. **No. 12160**

RAY L. NIELSEN and
MABEL W. NIELSEN,
Defendants and Respondents.

APPELLANTS' BRIEF

NATURE OF THE CASE

This is an action by buyers to recover a portion of monies paid under a real estate installment contract under the theory that sellers would be unjustly enriched if allowed to keep all monies paid on the contract as well as improvements made on real estate prior to buyers' default and application of a strict forfeiture provision.

DISPOSITION BY THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF GARFIELD

The matter was tried to the Court and a judgment of no cause of action was entered against the plaintiff. A motion for a new trial was denied, and this appeal taken.

NATURE OF RELIEF SOUGHT ON APPEAL

The appellants seek a reversal of the judgment of the lower court and for entry of judgment in favor of appellants based on the findings of the lower court, or in the alternative a remand to the lower court for supplemental findings and for entry of judgment according to the applicable law of the state.

STATEMENT OF FACTS

Appellants brought an action in February of 1965 in the Sixth Judicial District Court of the State of Utah in and for the County of Garfield seeking restitution based on respondents' unjust enrichment (R. 1-6). The action arose out of a contract between the parties for the purchase by appellants and sale by respondents of Nelson's Motor Court, 308 North Main, Panguitch, Utah. The said contract was entered into on or about July 1, 1958. The agreed on purchase price was $35,000.00, and a down payment of $10,150.00 was made at that time. Buyers took possession and made monthly payments of $200.00 each until December 1, 1961, for a total of $6,800.00, and added substantial improvements to the property, the value of which was fixed by the trial court at $2,977.00 (R. 37). Appellants' total input was thereby fixed at $19,927.00 or approximately 57% of the total purchase price. The trial court in Finding No. 5 (R-37) mistakenly used a down payment figure of $10,500.00, which would have produced a total input figure of $20,277.

Appellants' gross income from operation of the motel business during the four years they were in possession, as found by the trial court, was $30,500.00 (R. 37). The average monthly gross income was thereby fixed at approximately $635.00, out of which appellants were obliged to pay the $200.00 monthly installment, taxes and assessments, maintenance, payments on improvements, utilities and other operating expenses, and all overhead incidental to the operation of the business. Whatever was left, appellants kept

for their labors. The motel operation was seasonal in nature (R. 191) and produced, for example in 1962, as little as $70.50 in November and $26.50 in December (R. 195). Appellants were unable to make the monthly payment due December 1 and were unable to persuade respondents to modify the contract in any way so as to allow for more realistic monthly payments (R. 103, 136, 141). As another means of avoiding the default and strict forfeiture, appellants sought to refinance the contract, but their potential lender, HEEL Realty, of Provo, Utah, was advised by respondents that they would only accept a pay-out on the contract, meaning not only the principal balance but also all the interest that would accrue during the next 12 or so years, which together amounted to something in excess of $42,000.00 (R. 100-102). Having already had an input of $19,927.00 on a $35,000.00 business, an additional $42,000.00 was totally unacceptable, and appellants remained in default. On June 15, 1962, a letter was addressed to appellants' attorney giving notice that, based on appellants' default, the escrowed documents were being returned to the respondents (R. 133-134). The contractual provision on which sellers rely in retaining all monies reads as follows:

> "This contract shall be considered in default on the part of the Buyers if they fail to make payment within five days after the dates herein specified, or upon failure to do or perform any other covenant and agreement herein contained. In the event of such default, the Sellers can demand possession of said property and re-enter said premises and remove the purchasers and all other persons therefrom, and any payments made by the Buyers up to the time of such breach shall be retained by the Sellers as a compensation for the use and occupation by the Buyers of the said premises." (R. 5)

At about the time of the escrow withdrawal the parties discussed the possibility of appellants receiving something for their equity (R. 81-86), and even went so far as to have appellants' attorney prepare a settlement agreement (R. 83) but these negotiations came to naught and appellants vacat-

ed the premises on or about the 2nd day of July, 1962. Negotiations regarding a settlement continued between appellants' attorney, Carvel Mattsson, and respondents' attorney, Parker Nielsen, until the filing of the instant action in February, 1965. Thereafter, respondents were represented for various periods of time by Parker Nielsen, Ken Chamberlain, John Vernieu, Durham Morris, John Vernieu a second time, and then by respondents' instant counsel, Tibbs & Tervort. Numerous legal skirmishes occurred during this period, one resulting in an interlocutory appeal, which was dismissed by this court and the subject of which is not material here. The matter was ultimately tried and judgment entered, and this appeal taken.

ARGUMENT

POINT I

THE JUDGMENT OF THE TRIAL COURT IS NOT SUPPORTED BY ITS FINDINGS

The applicable law in Utah apparently stems from the case of **Malmberg v. Baugh,** 62 Utah 331 (1923). The crucial test in the cases flowing from Malmberg seems to be whether the amount forfeited reasonably relates to damages actually sustained by the seller or whether it represents a penalty imposed on the buyer for his nonperformance. The Utah court has consistently held that it will not enforce a penalty. **Perkins v. Spencer,** 121 Utah 468; **Crofts v. Jensen,** 86 Utah 13; **Young v. Hansen,** 117 Utah 591; **Jacobsen v. Swan,** 3 Ut. 2d 59; **Cole v. Parker,** 5 Ut. 2d 263; **Strand v. Mayne,** 14 Ut. 2d 355.

The crucial problem in each case is to determine the seller's actual damage so that it can be compared to the buyer's input, including payments and improvements. This Court in the case of **Perkins v. Spencer,** supra, set down a formula to assist in ascertaining the seller's actual damage. The Court said at page 451:

"The vendors are entitled to any loss occasioned them by any of these factors:

> "(1) Loss of an advantageous bargain;
>
> "(2) Any damage to or depreciation of the property;
>
> "(3) Any decline in value due to change in market value of the property not allowed for in items nos. 1 and 2; and
>
> "(4) For the fair rental value of the property during the period of occupancy.

"The total of such sums should be deducted from the total amount paid in, plus improvements for which it would be fair to allow recovery, and any remaining difference awarded to the plaintiffs."

The **Perkins v. Spencer** formula was reaffirmed in **Cole v. Parker,** supra. Since the formula is a means to an end, it would seem that in any given case a court would not be limited thereto if additional factors were clearly relevant to the actual damage sustained by the seller.

In the case at bar, the court found that the purchasers had paid $10,500.00 as a down payment, $6,800.00 in monthly payments, and had made improvements in the amount of $2,977.00, resulting in a total input of $20,277.00, or when corrected because of the erroneous down payment figure, a total of $19,927.00 (R. 37). Turning to the sellers' damage as found by the court, the fair rental for the period in question was $9,600.00 (R. 37). Sellers had paid a $500.00 commission on the sale, had been obliged to pay unpaid taxes in the amount of $437.20, and special assessments in the amount of $871.74 (R. 38). The total of these items is $11,408.94. With regard to the fair market value, the court found only that appellants' effort to sell before defendants retook possession yielded a firm bid of $30,000.00 and an asking price of $35,000.00 (R. 37). Sellers' actual damage was, therefore, fixed at $11,408.94 if there was no loss in market value, and a maximum of $16,408.94 if there had been a $5,000.00 loss in market value.

When sellers' actual damage as found by the court is deducted from buyers' input in the form of payments and improvements as found by the court, a difference of between $3,518.06 and $8,518.06 results, the exact figure depending on the figure ultimately arrived at as fair market value at the time of repossession. To this extent, based on the trial court's findings, the sellers were unjustly enriched.

POINT II

THE TRIAL COURT WAS EITHER MISTAKEN IN ITS UNDERSTANDING OR REFUSED TO APPLY THE LAW OF THIS STATE ON FORFEITURES UNDER REAL ESTATE INSTALLMENT CONTRACTS.

A. PROCEEDING OUTSIDE THE CONTRACT: At trial it appeared that The Court had some difficulty in acquainting itself with the concept of unjust enrichment, basically taking the position that the only thing that was relevant in the lawsuit was what the forfeiture provision of the contract provided. The Court, for example, said:

> "THE COURT: . . . The thing that bothers me, The Court, at this particular moment, gentlemen, and probably will throughout this case, is that we have a contract, solemnly engaged in by two parties. The purchaser under the contract, the plaintiff in this case, apparently concluded in '61 or '62 that he had made, maybe, a bad bargain and he wanted to make a settlement. Now, the defendant was under no obligation to settle. . . ." (R. 111)

The Court went on to say:

> "THE COURT: . . . I am reaching for some reason to justify any man, I don't care who he is, under our law, where I engage to buy property for a specific sum of money to be paid in specific fashion and then I discover, of course, the bargain I made probably wasn't too good, how then can I go back to the seller, to the man who sold this property and say, 'Now, listen, give me part of the money back.' Is he under any contractural obligation, legal, equitable or moral. That's the thing that bothers me." (R. 112)

To this, counsel for the appellants reponded:

> "MR. McIFF: Your Honor, the only way that he can is to show that he has paid in an amount greater than that which the seller is entitled to keep to recoup any loss. That's the unjust enrichment. Our position is that they have paid in more money than the sellers are entitled to keep." (R. 112)

Thereafter, The Court repeated its position, and when reminded by appellants' counsel that sellers had terminated the escrow and retook possession of the subject premises, The Court said:

> "THE COURT: Well, when you say that then I ask, 'Did they have a right under the contract.' The contract is the sole measure of their limit or right to responsibilities." (R. 114)

B. DAMAGES VS. PENALTY: Another statement offered by The Court in its memorandum decision which appears untenable is as follows: "The mere largeness of the sum fixed upon for the doing or not doing a particular act, that is, the fact of its being disproportionate in amount to the damage resulting therefrom, will not of itself be a sufficient reason for holding it to be a penalty." (R. 34) That language may well be found in some law book, but when applied to strict forfeiture cases could allow a seller who has suffered minimal damages to retain any payment, no matter how large, short of full performance without the same being considered a penalty.

The most rudimentary element of the unjust enrichment concept is that if the seller's damage brought about by buyer's default is not commensurate with monies retained by seller, then the excess retained has the effect of penalizing the buyer. This Court in **Malmberg v. Baugh,** supra, stated:

> "The vital question to be determined is: What is the correct measure of damages in a case of this kind? Shall we apply the rule of compensatory damages, or is it a case in which punitive damages

> should be allowed? Upon what principle can punitive damages or damage in excess of compensation for the injury done be justified in the case at bar? These are questions that appeal both to the judgment and conscience of the court . . . . The rule contended for by respondent, carried to its logical sequence, would forfeit every dollar paid by appellant and still leave respondent in possession of the land even if appellants had paid the last installment but one, and then defaulted." 62 Utah at 340 and 345.

Relying heavily on the **Malmberg** case, the Supreme Court of California in an opinion by Justice Traynor said:

> "Such penalties cannot reasonably be justified as punishment for one who wilfully breaches his contract . . . . if a penalty were to be imposed it should bear some rational relationship to its purpose. A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Thus a vendee who breaches his contract before he has benefited the vendor by part performance suffers no penalty, whereas one who has almost completely performed his contract suffers the maximum penalty." **Freedman v. Rector of St. Mathias Parish,** 230 P. 2d 629 (Cal. 1951).

The **Restatement of Contracts** has taken the position that restitution to a plaintiff in default is appropriate when his part performance has resulted in a net benefit to the defendant, provided that the breach of contract was not "willful and deliberate." A breach due to financial hardship or error of judgment is not considered willful and deliberate. **Restatement, Contracts,** Section 357, Comment e (1932).

C. RELEVANCY OF VALUE: The Court further demonstrated an unawareness of the concept of unjust enrichment and the evidenciary matters relevant thereto as is evidenced by its attitude toward the question of the fair market value of the property at the time of repossession. On cross-examination of the appellant Mr. Jensen, counsel

for the respondents secured responses to the effect that appellants had offered the property for sale at $40,000.00 and then at $35,000.00 and had turned down a firm offer to purchase at $30,000.00. When counsel for the appellants inquired into the same subject on redirect, the following discussion ensued:

> "THE COURT: Of course, I can't see the materiality, gentlemen, of the value of the property at any time, after the date of the contract. . . . I presume he could have sold it for thirty thousand dollars if he had made up the difference to the seller, the defendant in this case, but where is the materiality of it. Why are we concerned about the value of the property? What has that got to do with it? (R. 126-127)
>
> "MR. McIFF: Well, let me add this and if counsel wants to add something else, that can be added, too. Well, the relevancy, Your Honor, of the value of the property is all caught up in the formula of unjust enrichment. We are attempting to find out whether or not the property had depreciated or appreciated in value during the period of the contract . . . . (R. 127)
>
> "THE COURT: Following or pursuing that particular reasoning then, he said the only offer he had was thirty thousand dollars, so it would seem that it was worth less money than when he paid for it in 1958. Now there could be a multitude of reasons for that. I don't know. (R. 127)
>
> "MR. TIBBS: If what counsel says is true, then I've got to orient us, because what the court says is true. Under our theory of the case, we stand on the contract, it is not material, because we are standing on the contract and the forfeiture was reasonable, but under their theory of the case, it becomes an element that should be considered by the court and this is what counsel was saying and so under their theory of the case, if there's an appreciation in value, of course, that's a factor that should be considered, but under their theory of the case, if there's a depreciation of the property, then

it's a factor that should be considered, so that in other words, the reason we're asking the question is based on their theory of the case, but I have to reach it because I come in through the back door and if the court decides for some reason, 'I am going with them on their theory of the case,' then I'm in a position that I got to point out there's depreciation rather than appreciation. (R. 127-128)

"THE COURT: I have listened to both of you but I don't agree with either of you." (R. 128)

"MR. JACKSON: But the court has listened to the discussion of the thirty thousand dollar offer and he was just going to relate another discussion he had concerning the sale of the property, which ought to be as relevant as the prior discussion. (R. 128)

"THE COURT: Assuming, of course, that the value of the property is a relevant issue in this case, well, yes. (R. 128)

MR. JACKSON: That's right. (R. 128)

"THE COURT: Now, I can't see the relevancy of the issue of value. (R. 128)

"MR. TIBBS: It's only relevant, Your Honor— (R. 128)

"THE COURT: The only thing it does is this: you may be able to prove that in 1958 when he bought this property, it was worth $35,000.00 and when he offered it for sale in 1961, it was only worth $30,000.00, so it depreciated in value. Now, you may have to charge that depreciation to him. I don't think you can do it. Nobody knows what the reason is. Today, I think we are all willing to admit that the value of property has appreciated measureably. I don't know of any— (R. 129)

"MR. TIBBS: Not this property, not this motel property. (R. 129)

"THE COURT: I mean most property, land generally . (R. 129)

"THE COURT: My point is that that was only

> a better way that the Plaintiffs should have stayed in possession, for example, and I can't see any materiality to this question of value, whether it's one hundred thousand now or ten thousand." (R. 129)

In keeping with The Court's attitude as to the relevancy of value, it declined to find what the fair market value at the time of forfeiture was, finding, instead, only that there had been an offer for sale of $35,000.00 and an offer for purchase of $30,000.00, and this despite the fact that appellants offered evidence by two competent real estate appraisers who appraised the property for lending purposes at the crucial time at $40,000.00 and $45,000.00 (R. 161 & 155).

D. RELEVANCY OF INCOME: In contrast to its attitude about the relevancy of market value, The Court placed great stress on the matter of the gross income from the business, as is evidenced by the following statement from its memorandum decision:

> "This court cannot ignore the fact that Plaintiffs realized a total of $30,500.00 during the four years they occupied these premises." (R. 33)

In the preceding sentence, The Court had said:

> "Counsel for the Plaintiffs in their complaint and in their memorandum make no reference to the money received by Plaintiffs during their four-year occupancy." (R. 33)

To the contrary, however, appellants in their memorandum spent considerable time discussing the relevancy of income. Appellants' brief provided:

> "In the case of **Christy v. Guild,** 1 Utah 313, the buyers had purchased sellers' property with no down payment and a rate of $30.00 per month and buyers had made some $2,000.00 worth of improvements. The court, however, found that the buyers had been receiving $75.00 net monthly rental from the premises, so that the difference between the $75.00 received and the $30.00 paid was applied to cancel the $2,000.00 worth of improvements. In this sense income is a relevant consideration, but it must be the

> income produced by the property absent any other contribution, such as labor, supplies, and management. During the four years in question the business operated by the buyers produced a gross intake of $29,000.00 [$30,500.00], or approximately $604.00 [$635.00] per month. Of this $604.00 [$635.00], $200.00 has been assigned as fair rental value of the property. Out of the remaining $404.00 [$435.00] the business had to pay maintenance, management, taxes, labor, utilities, supplies and equipment, and various other and sundry expenses incidental to the operation of the business. It would therefore, be obvious that the $200.00 overstated the fair rental value of the property, since in light of the other costs of operating the business, the rental portion is grossly disproportionate." (R. 18-19)

It is appellants' position that income is a relevant consideration because of its evidenciary value on the question of both fair rental value and fair market value but is not a direct offset against monies a defaulting purchaser would be entitled to recover under an unjust enrichment theory.

E. CLEAN HANDS: In its memorandum decision, The Court Provided:

> "The equitable maxim that 'He who seeks equity must do equity,' hence the parties seeking relief against forfeiture must perform or tender performance of the defaulted obligation or make or tender payments of the compensation on which the relief is predicated." (R. 34)

In its conclusions of law, The Court said:

"The Plaintiffs are not coming into this court with clean hands." (R. 38)

This is reminiscent of the logic of courts which have declined to accept the position to which this court is firmly committed under **Malmberg v. Baugh**, supra, and the cases flowing therefrom. The notion that "A plaintiff who has himself broken the terms of the contract, cannot obtain any compensation for the part performance that he may have

rendered," and the notion that "the blameworthiness inherent in the purchaser's default" precludes his recovery, are common to decisions running counter to the line of decisions of this court. An excellent discussion of the subject from which the immediately preceding quotes, as well as other discussion contained herein, were taken, was written by Bridget M. Bodenheimer under the title, "Forfeitures Under Real Estate Installment Contracts in Utah," and appears at 3 **Utah Law Review** pages 30 to 44.

CONCLUSION

On a $35,000.00 contract the appellants have paid some $16,950.00 and made improvements totaling $2,977.00, the sum of which amounts to approximately 57% of the contract price. Finding it impossible to meet their obligations under the contract, appellants pleaded with respondents to allow them to refinance or assign their interest. Respondents declined unless appellants woud pay an additional forty two thousand some odd dollars. Appellants found it impossible to remedy their default, were dispossessed, and respondents, applying the forfeiture provision of the contract, have kept all the monies paid by appellants as well as received return of the motel with improvements. The findings of the trial court were to the effect that respondents' actual damage was some $3,518.06 to $8,518.06 less than appellants' input. In handing out its judgment, the trial court apparently relied on misunderstandings about the concept of unjust enrichment, the relevancy of market value, the relevancy of income, and certain legal maxims used by courts to support what for many years was, and may still be, the majority view, but which is patently inconsistent with the position taken by this court in decisions flowing from **Malmberg v. Baugh**, supra, and by other courts which have followed the lead of this court and its decisions in this area. This court should either reverse the judgment of the lower court and enter judgment for appellants based on the record on appeal and particularly the findings of the trial

court, or in the alternative should remand the case with a directive that the trial court make any necessary supplemental findings and enter judgment thereon according to the law of this state.

Respectfully submitted,

K. L. McIFF
151 North Main
Richfield, Utah