

1994

Kenneth F. Palmer, Jr., and Rebecca A. Palmer,
husband and wife v. Edward Hayes and Stephanie
Hayes, husband and wife : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Palmer v. Hayes*, No. 940416 (Utah Court of Appeals, 1994).

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UTAH COURT OF APPEALS
BRIEF

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940416

IN THE UTAH COURT OF APPEALS

KENNETH F. PALMER, JR., and
REBECCA A. PALMER, husband
and wife,

Plaintiffs/Appellants,

vs.

EDWARD HAYES and STEPHANIE
HAYES, husband and wife,

Defendants/Appellees,

MAPLE HILLS REALTY, a Utah
corporation, RONALD L.
MARSHALL, TOM BAKER, and
CAROL D. EDGMON,

Defendants.

BRIEF OF THE APPELLEES

Appellate Court No. 940416-CA

Argument Priority
Classification 15

APPEAL FROM SUMMARY JUDGMENT AND RULE 54(b)
CERTIFICATION OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, JUDGE
HANSON

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JUL 22 1994

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LIST OF PARTIES

The caption on the cover lists all of the parties to this action.

TABLE OF CONTENTS

Table of Authorities	4
Jurisdictional Statement	6
Issues Presented and Standard of Review	6
Determinative Constitutional Provisions, Statutes, Ordinances, Rules, and Regulations	7
Statement of Facts	7
Summary of the Argument	10
Argument	11
I. Election of the Remedy	11
A. The facts necessary to determine the issue of election of remedy are undisputed	11
B. Utah case law imposes an affirmative burden on the Palmers to tender a refund of the earnest money deposit in order to bring a suit for damages	12
C. The Blackburn letter constitutes an election of the remedy of liquidated damages as a matter of law	15
II. Attorney's Fees	20
A. General framework for the recovery of attorney's fees in court actions	20
B. The actions of the Palmers constitute a default as a matter of law	22
C. The Hayes are entitled to the recovery of their reasonable attorney's fees as a matter of right and law	24
D. Utah Code Ann. § 78-27-56.5 also provides for the recovery of the Hayes' attorney's fees	26
Conclusion	28

TABLE OF AUTHORITIES

CASES:

<u>Andreasen v. Hansen</u> , 335 P.2d 404 (Utah 1959)	13,15,20
<u>Cabrera v. Cottrell</u> , 694 P.2d 622 (Utah 1985)	24
<u>Carr v. Enoch Smith Co.</u> , 781 P.2d 1292 (Utah App. 1989)	26
<u>Clegg v. Lee</u> , 516 P.2d 348 (Utah 1973)	25
<u>Close v. Blumenthal</u> , 354 P.2d 856 (Utah 1960)	13-15,20
<u>Cobabe v. Crawford</u> , 780 P.2d 834 (Utah App. 1989)	24,26
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985 (Utah 1988)	20
<u>Dowding v. Land Funding Ltd.</u> , 555 P.2d 957 (Utah 1976)	12,13,20
<u>Easterwood v. Willingham</u> , 47 S.W.2d 393 (Tex. Civ. App. 1932)	22
<u>Equitable Life & Casualty Ins. Co. v. Ross</u> , 849 P.2d 1192 (Utah App. 1993)	7
<u>Estate of Schmidt v. Downs</u> , 775 P.2d 427 (Utah App. 1989)	21
<u>Fashion Place Inv., Ltd. v. Salt Lake County/ Salt Lake County Mental Health</u> , 776 P.2d 941 (Utah App. 1989)	7
<u>Hackford v. Snow</u> , 657 P.2d 1271 (Utah 1982)	23,24
<u>Kimball v. Campbell</u> , 699 P.2d 714 (Utah 1985)	7
<u>McMullin v. Shimmin</u> , 349 P.2d 720 (Utah 1960)	13,20
<u>Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co.</u> , 765 P.2d 5 (Utah App. 1988)	7
<u>Sadler Mach. Co. v. Ohio Nat'l, Inc.</u> ,	

202 F.2d 887 (6th Cir. 1953)	22
<u>Saunders v. Sharp</u> , 793 P.2d 927, 931 (Utah App. 1990), on remand, 840 P.2d 796, 809 (Utah App. 1992)	24,26
<u>Saunders v. Sharp</u> , 806 P.2d 198 (Utah 1991)	7
<u>Simpson Dev. Corp. v. Herrmann</u> , 583 A.2d 90 (Vt. 1990)	22
<u>Singer Co. v. Baltimore Gas & Elec. Co.</u> , 558 A.2d 419 (Md. Ct. Spec. App. 1989)	22
<u>Soffe v. Ridd</u> , 659 P.2d 1082 (Utah 1983)	26
<u>Stacey Properties v. Wixen</u> , 766 P.2d 1080 (Utah App. 1988)	26
<u>Trayner v. Cushing</u> , 688 P.2d 856 (Utah 1984)	20
<u>Turtle Management, Inc. v. Haggis Management,</u> <u>Inc.</u> , 645 P.2d 667 (Utah 1982)	20
<u>Walker v. Brigham City</u> , 856 P.2d 347 (Utah 1993)	6
<u>Zions First Nat'l Bank v. National Am. Title Ins. Co.</u> , 749 P.2d 651 (Utah 1988)	7

STATUTES:

Utah Code Ann. § 78-27-56.5 (Attorney's fees--Reciprocal rights to recover attorney's fees.)	26
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OTHER AUTHORITY:

<u>Black's Law Dictionary</u> , 6th Ed.	22
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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether the demand of the Palmers through their attorney, Michael D. Blackburn, that the earnest money deposit not be returned to the Hayes and the failure of the Palmers at any time to offer to refund the earnest money deposit to the Hayes constituted an election of the remedy of liquidated damages under the earnest money agreement. The standard of appellate review for a summary judgment is for correctness.¹

2. Whether the initiation of a suit for actual damages by the Palmers after electing the earnest money deposit as their exclusive remedy constitutes a "default" under the earnest money agreement, thus, entitling the Hayes to the recovery of their reasonable attorney's fees incurred in enforcing their rights under the earnest money agreement. The standard of appellate review for interpreting a contractual term as a matter of law on a motion for summary judgment is for correctness, affording no deference to the

¹E.g., Walker v. Brigham City, 856 P.2d 347, 348 (Utah 1993).

conclusions of the trial court below.²

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES
RULES, AND REGULATIONS**

Utah Code Ann. § 78-27-56.5 (Attorney's fees--Reciprocal rights to recover attorney's fees.)

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

STATEMENT OF FACTS

Prior to December 7, 1992, the Palmers were owners of a single family residence located at 2792 South Wood Hollow, Bountiful, Utah.³

The Palmers previously listed their real property with Maple Hills Realty. They used Carol Edgmon as their Sellers' agent. Ms.

²Saunders v. Sharp, 806 P.2d 198, 200 (Utah 1991); Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988); Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); Equitable Life & Casualty Ins. Co. v. Ross, 849 P.2d 1192 (Utah App. 1993); Fashion Place Inv., Ltd. v. Salt Lake County/Salt Lake County Mental Health, 776 P.2d 941, 943 (Utah App. 1989); Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co., 765 P.2d 5,9 (Utah App. 1988).

³R. at 245.

Edgmon was an agent working with Maple Hills Realty.⁴

Prior to December 7, 1992, the Hayes retained Mr. Tom Baker as their Buyers' agent to locate a home for them in the Davis County or Salt Lake County areas. Mr. Baker was also an agent working with Maple Hills Realty.⁵

On December 7, 1992, the Hayes entered into a standard earnest money agreement for the purchase of the Palmer's home. The Hayes paid \$2,000.00 to Maple Hills Realty as earnest money under the agreement.⁶

The earnest money agreement contained the following provision:

N. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by [Hayes], [Palmers] may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of [Palmers]. . . . Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.⁷

The purchase of the home was not completed. The Palmers contend that the Hayes breached the earnest money agreement. The

⁴R. at 246.

⁵R. at 41.

⁶R. at 7-10.

⁷R. at 10.

Hayes contend that they did not breach the earnest money agreement.⁸

The Hayes demanded return of the \$2,000.00 earnest money that they had paid to the Palmers' Broker, Maple Hills. Maple Hills responded by delivering to them a document which purported to release Maple Hills from all liability with respect to the ill-fated sale. Maple Hills required all parties to sign this document before the \$2,000.00 would be released. Ms. Hayes signed the release but Mr. Hayes refused, pointing out to Maple Hills that it had no right to dictate any terms of such release. He further demanded Maple Hills to release the \$2,000.00 or if the Palmers were objecting to the release to tell him the expressed objections that the Palmers had.⁹

Through their attorney, Mr. Michael D. Blackburn of Snow, Christensen and Martineau, the Palmers objected to the release of the \$2,000.00 to the Hayes and instructed Maple Hills to not release the money. The pertinent part of Mr. Blackburn's letter reads as follows:

We have been informed that you retain a \$2,000.00 earnest money deposit in your trust account. We also understand that Mr. and Mrs. Hayes have requested a refund of this deposit. Demand is hereby made that this money not be removed from the trust account for any reason without the

⁸R. at 246-251.

⁹R. at 46 (reproduced at Tab "A").

prior written permission of Kenneth F. and Rebecca A. Palmer.¹⁰

Maple Hills then interplead the \$2,000.00 into the Circuit Court for Davis County, Civil No. 938-289. The Palmers moved to dismiss this interpleader action and then sued the Hayes for damages in the present case contending that the Hayes unjustifiably breached the earnest money agreement. The Palmers have sought over \$100,000.00 in damages.¹¹

At no time herein have the Palmers made any effort to tender the \$2,000 earnest money deposit to the Hayes, nor have the Palmers ever given authorization for its release.

The Hayes were required to retain the services of the law firm of Kesler & Rust to represent them in this action. The Hayes have incurred \$12,390.20 in attorney's fees and \$3,007.47 in court costs in association with this representation both on the trial court level and on appeal, which fees and costs are reasonable and necessary through June 30, 1994.

SUMMARY OF THE ARGUMENT

Those facts necessary for the summary judgment are undisputed. The Blackburn letter and the fact that the Palmers never made any

¹⁰R. at 108 (reproduced at Tab "B").

¹¹See generally, Plaintiffs' Amended Complaint.

effort to tender a refund of the earnest money deposit to the Hayes before bringing this suit for damages constitute, as a matter of law, an election of the remedy of liquidated damages. The strategy that the Palmers are attempting, in asking the court to hold the deposit as an offset against possible future damages, has already been litigated and clearly rejected by the Utah Supreme Court.

The election of remedies clause in the earnest money agreement created a duty on the Palmers not to sue for damages once they had elected to retain the earnest money as liquidated damages. Thus, the initiation of this suit by the Palmers while still retaining the earnest money deposit constitutes a default under the agreement. This default entitles the Hayes to their reasonable attorney's fees incurred at trial and on appeal in defense of this action as a matter of right and law.

ARGUMENT

I. ELECTION OF REMEDY

A. The facts necessary to determine the issue of election of remedy are undisputed.

The Palmers emphasize in their brief what they believe to be disputed facts that make summary judgment inappropriate in this case. Their arguments, however, misconstrue which facts are essential to the summary judgment. The essential (and undisputed) facts upon which the summary judgment is based are only four:

first, that the Hayes made demand for the return of their \$2,000 earnest money deposit;¹² second, that a letter was sent from the Palmers' attorney, Mr. Blackburn, to Maple Hills Realty whose contents are discussed below;¹³ third, that the Palmers have never made any attempt to tender the \$2,000 deposit to the Hayes; and fourth, that the Palmers have brought this suit for damages against the Hayes. Many other facts have been supplied to the court through various pleadings, but these were given by both sides to provide a background for the court in making its ruling. Only those facts listed above are necessary for the summary judgment.

B. Utah case law imposes an affirmative burden on the Palmers to tender a refund of the earnest money deposit in order to bring a suit for damages.

The Utah Supreme Court has ruled on several cases with facts similar to those at issue here. In Dowding v. Land Funding Limited,¹⁴ the vendor sued the purchaser, after a failed sale, for actual damages under the earnest money agreement. The agreement provided that, "amounts paid herein shall, at the option of the seller, be retained as liquidated and agreed damages."¹⁵ The seller

¹²See, letter of Edward Hayes dated February 8, 1993 (Tab "A").

¹³See, letter of Michael D. Blackburn dated March 8, 1993 (Tab "B").

¹⁴555 P.2d 957 (Utah 1976).

¹⁵Id. at 957.

retained the \$200 of earnest money and then brought suit. In response to this withholding of money the court said: "[the seller] did not, nor did his agent, offer to return the \$200, which was deposited with the clerk of the court after the suit was filed, so [seller's] damages obviously appear to be \$200 as agreed."¹⁶ There was no equivocation by the Utah Supreme Court. "Under the terms of the Earnest Money Agreement if the sale is not consummated, the damages are as mentioned above, where the Seller opts to retain the amounts paid as was the case here, where no offer to return the sum was made."¹⁷ The Supreme Court has not allowed sellers to retain earnest money deposits and then sue for actual damages. Its holding in all of the cases which have addressed the issue is as clear as the wording within paragraph "N" of the Earnest Money Sales Agreement that is the subject of this lawsuit, i.e. "In the event of a default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of seller."¹⁸ "This clause is for the benefit of the seller. He will obviously always choose the

¹⁶Id. (emphasis in original).

¹⁷Id. Accord, Close v. Blumenthal, 354 P.2d 856 (Utah 1960); McMullin v. Shimmin, 349 P.2d 720 (Utah 1960); Andreasen v. Hansen, 335 P.2d 404 (Utah 1959).

¹⁸R. at 10, (emphasis added).

option to his advantage and to the disadvantage of the buyer. Under those circumstances the clause should be strictly applied against the seller and he should be held to meet its requirements with exactness."¹⁹

The Palmers cannot sue the Hayes for damages unless they have first made some effort to return the \$2,000 deposit to the Hayes. Otherwise, they must be deemed by law to have elected the remedy of liquidated damages. No attempt to tender the \$2,000 to the Hayes has ever been made by the Palmers. Instead the Palmers have expressly requested that the court retain the \$2,000 as an offset against the damages to which they believe they are entitled under this suit.²⁰ This exact strategy has already been attempted and rejected by the Utah Supreme Court in Close v. Blumenthal:²¹

It is further to be observed that to permit the seller to retain the money [liquidated damages] and also to sue for specific performance would in effect render the option clause meaningless by not requiring him to exercise his option. It seems only fair and reasonable that where the contract provides that the seller may "at his option" retain the earnest money payment as liquidated damages, in lieu of enforcing the contract, he should be required to make his choice to do one or the other, and to act consistently therewith. That he has his choice is enough without giving him the advantage of both alternatives and thus providing two strings to his

¹⁹Close, at 857.

²⁰See, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment. (R. at 165-166.)

²¹Supra, note 17.

bow. The plaintiff having kept the \$500.00 must be deemed to have kept it for the purpose indicated in the contract, this is, as liquidated damages and is precluded from the other remedy.²²

While Close dealt with the Palmers strategy in a suit for specific performance, Andreasen v. Hansen²³ dealt with this same issue in a suit for actual damages. Again, the Utah Supreme Court stated:

[T]he provision he [the seller] now relies upon gave him, at best, a choice of two alternatives: either to keep the amount paid in as liquidated damage, or to rely upon the offer to purchase. The fact that the money was kept is incontrovertible evidence that the plaintiffs exercised the option to keep it. That being so, they must be deemed to have kept it for the purpose indicated in the contract, that is, as liquidated damages.²⁴

The Palmers' strategy has already been rejected by the Utah Supreme Court and should be rejected here.

C. The Blackburn letter constitutes an election of the remedy of liquidated damages as a matter of law.

The Palmers' brief focuses almost exclusively on the issue of whether the Blackburn letter constitutes an election of the remedy of liquidated damages as a matter of law. That letter states:

We have been informed that you retain a \$2,000.00 earnest money deposit in your trust account. We also understand that Mr. and Mrs. Hayes have requested a refund of this deposit. Demand is hereby made that this money not be

²²Close, at 857.

²³Supra, nt. 17.

²⁴Andreasen, at 408 (emphasis added).

removed from the trust account for any reason without the prior written permission of Kenneth F. and Rebecca A. Palmer.²⁵

The Palmers argue that the trial court failed to give them the benefit of four "reasonable inferences" that could be derived from this letter which would make it something other than what it appears to be on its face, i.e., a demand that the earnest money deposit not be released to the Hayes.

The first inference the Palmers would like this Court to draw from the Blackburn letter "is that the Palmers did not elect to [sic] remedy of earnest money, but simply declined to sign the written form as presented."²⁶ The letter, however, does not address any concerns that the Palmers may have had about the form of the release, nor does it even refer to the release presented by Maple Hills. What the letter does address is control of the \$2,000 deposit. At the very least the letter must be read as an assertion of control over the money by the Palmers. The argument by the Palmers that, "Demand is hereby made that this money not be removed from the trust account for any reason without the prior written permission of [the Palmers]" means something other than "don't release the money to the Hayes" is inane. Further, the attempt to

²⁵Letter of Michael D. Blackburn, attorney for the Palmers, to Maple Hills Realty dated March 8, 1993 (reproduced at Tab "B").

²⁶Brief of Appellants at 18 (emphasis deleted).

construe the statements of the trial court as an admission that the Blackburn letter was "obviously" a response to the form of the release is a transparent misconstruction of a quote out of context.²⁷

The second inference the Palmers suggest "is that the letter is not an unequivocal election of the remedy of earnest money but is, rather, a preservation of the status quo until such time as the Palmers had the opportunity to decide what remedy to elect."²⁸ While it is true that the earnest money agreement imposes no time limit upon the Palmers for electing their remedy, this does not mean that the Palmers were free to institute a suit for damages against the Hayes while still retaining control over the earnest money deposit and refusing to release it to the Hayes. The Hayes had made demand for the return of the \$2,000 when the sale of the home collapsed.²⁹ The Hayes were entitled to the return of their deposit upon demand unless the Palmers elected to retain the \$2,000 as their liquidated damages. Even if the intention of the Blackburn letter was to simply maintain the status quo, the Palmers

²⁷See, Brief of Appellants at 18-19.

²⁸Brief of Appellants at 19 (emphasis deleted).

²⁹See, letter of Edward Hayes to Maple Hills Realty dated February 8, 1993 (reproduced at Tab "A"); see also, letter of Michael D. Blackburn to Maple Hills Realty dated March 8, 1993 (reproduced at Tab "B").

must be deemed to have elected the remedy of liquidated damages because they refused to release control of the money when it was demanded and continued to retain control over the money even after bringing suit for damages. In effect the Palmers are trying to say, "You can't have your money back, but that doesn't mean that I'm keeping it either." The fact remains that the Palmers did retain control over the earnest money deposit and they should not now be allowed to have it both ways.

The third inference that the Palmers claim the trial court failed to give them is really an argument that the trial court made three errors in interpreting the Blackburn letter and the relationship between the Palmers, the Hayes, and the broker, Maple Hills. These alleged errors are that:

(1) the trial court repeatedly misread the Blackburn letter as an instruction to not release the money, despite the fact that no such language appears anywhere in the Blackburn letter; (2) the trial court repeatedly refused to consider that the real estate broker was also the agent of [the Hayes]; and (3) that the trial court imposed on the Palmers the duty of instructing the agent of [the Hayes] how to redraft its form for return of [sic] earnest money.³⁰

Each one of these allegations is groundless. Of the first allegation all that needs to be said is that to claim that there is no language instructing Maple Hills not to release the earnest money in the Blackburn letter is absurd. That is exactly what it

³⁰Brief of Appellants at 20 (emphasis deleted).

says.

The second and third allegations both involve the dual representation of Maple Hills as both buyer's and seller's agent. The trial court did consider the nature of this relationship and pointed out that for purposes of the election of remedies it did not make a difference.³¹ The earnest money deposit was paid over by the Hayes to Maple Hills as the agent of the Palmers. It is the seller's agent and not the buyer's that holds the earnest money deposit. Thus, Maple Hills held the \$2,000 as representative of the Palmers, not the Hayes. It was the Palmers who had control over the deposit and were entitled to instruct their agent as to its handling. The only instruction that the Palmers ever gave to their agent was to not release the money.³²

The question of Maple Hills' improprieties is an entirely separate issue. If the Palmers had instructed Maple Hills to refund the money to the Hayes and Maple Hills had refused or insisted on some inappropriate form of release then the Palmers could have sued Maple Hills for breach of their fiduciary duty, but the Palmers never made any effort to refund the deposit to the Hayes, instead the Palmers instructed their agent not to release the money. The Utah case law is clear on this point--the Palmers

³¹See, R. at 368.

³²See, Blackburn letter (reproduced at Tab "B").

have elected their remedy by retaining the earnest money deposit without making any effort to tender it to the Hayes.³³

The fourth "reasonable inference" that the Palmers claim the trial court failed to make "is that Blackburn's letter is nothing more than a reminder to the real estate broker of the broker's obligation under State of Utah regulations governing trust accounts."³⁴ This contention strains the meaning of "reasonable inference". There is no reference in the letter to state regulations or even to the proper handling of trust accounts. The letter cannot be viewed as anything other than what it is--an instruction not to release the deposit to the Hayes.

II. ATTORNEY'S FEES

A. General framework for the recovery of attorney's fees in court actions.

Utah follows the traditional American rule that attorney's fees are recoverable if provided for by statute or contract, and that when the attorney's fees are provided for by contract, they are only recoverable according to the terms of that contract.³⁵ The

³³See, Dowding v. Land Funding Ltd., 555 P.2d 957 (Utah 1976); Close v. Blumenthal, 354 P.2d 856 (Utah 1960); McMullin v. Shimmin, 349 P.2d 720 (Utah 1960); Andreasen v. Hansen, 335 P.2d 404 (Utah 1959).

³⁴Brief of Appellants at 22.

³⁵Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984); Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671

agreement between the Palmers and Hayes was governed by an earnest money agreement that states in pertinent part:

N. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by [Hayes], [Palmers] may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of [Palmers]. . . . Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.³⁶

Thus, attorney's fees were provided for by contract in the case of default by either party.

In ruling on the issue of attorney's fees on the motion for summary judgment the trial court held that the earnest money agreement did provide for the award of attorney's fees in case of default by either party, but denied the Defendants' request for attorney's fees, holding that the Palmers had not defaulted under the terms of the earnest money agreement. The court reasoned that electing the \$2,000 as liquidated damages and then pursuing a legal remedy for actual damages did not constitute a default:

[The Palmers] have elected to attempt to pursue a remedy to which they are not entitled, but they have not "defaulted" under the Earnest Money Agreement. There

(Utah 1982); Estate of Schmidt v. Downs, 775 P.2d 427 (Utah App. 1989).

³⁶R. at 10.

apparently being no other basis upon which the [Hayes] seek attorney's fees, and the Court having determined that the contract does not allow attorney's fees except in circumstances of "default", the [Hayes] request for attorney's fees must be refused.³⁷

The Hayes maintain that the actions of the Palmers did amount to a default as a matter of law, and thus, the Hayes were wrongly denied their attorney's fees in this action.

B. The actions of the Palmers constitute a default as a matter of law.

Black's Law Dictionary 6th Ed. defines default as "the omission or failure to perform a legal or contractual duty."³⁸ The Supreme Court of Vermont, in a case with similar facts to the present case, has defined default as being synonymous with breach of contract when interpreting a limitation-of-remedies clause.³⁹ There is also authority for the proposition that there can still be a default even where there is no wrongful act.⁴⁰ The earnest money agreement between the Palmers and Hayes created a duty upon the Palmers to not seek further damages once they had elected to retain the \$2,000 deposit as liquidated damages. For the Palmers

³⁷R. at 303-304.

³⁸Citing, Easterwood v. Willingham, 47 S.W.2d 393, 395 (Tex. Civ. App. 1932); see also, Singer Co. v. Baltimore Gas & Elec. Co., 558 A.2d 419, 428 (Md. Ct. Spec. App. 1989).

³⁹Simpson Dev. Corp. v. Herrmann, 583 A.2d 90, 92 (Vt. 1990).

⁴⁰Sadler Mach. Co. v. Ohio Nat'l, Inc., 202 F.2d 887, 893 (6th Cir. 1953).

to bring the present action seeking recovery of damages while retaining the liquidated damages is a breach of the contractual terms set forth in the earnest money agreement, and thus constitutes a default as a matter of law.

Utah law also provides support for this conclusion. In Hackford v. Snow,⁴¹ the Utah Supreme Court dealt with the issue of awarding attorney's fees under an earnest money agreement very similar to the one at issue here. The applicable provision of the agreement in Hackford read, "If either party fails to [perform], he agrees to pay all expenses of enforcing this agreement or any right arising out of the breach thereof, including a reasonable attorney's fee."⁴² While the provision in Hackford and that at issue in the present case differ slightly in their wording their intent is clearly the same. It is the failure to perform in one and the default in the other that entitles the other party to recover their attorney's fees.

The trial court in Hackford found that the party from whom the attorney's fees were sought "had failed to comply with the terms and the conditions of the [earnest money] agreement."⁴³ Thus, it was error for the trial court not to award attorney's fees as

⁴¹657 P.2d 1271 (Utah 1982).

⁴²Id. at 1277.

⁴³Id.

provided for in the contract.⁴⁴

The Hayes find themselves in an identical situation to the Hackford case. The trial court found that the Palmers' retention of the earnest money deposit precluded the present action for damages.⁴⁵ Thus, the Palmers' suit for damages is a violation of the terms and conditions of the agreement, or in other words, a default⁴⁶ under the agreement. Despite this finding, the trial court has denied the Hayes the attorney's fees to which they are entitled as a matter of law under the terms of the earnest money agreement.

C. The Hayes are entitled to the recovery of their reasonable attorney's fees as a matter of right and law.

When a contract provides for the recovery of attorney's fees in the case of default and a default has occurred, the non-defaulting party is entitled to their reasonable attorney's fees incurred in enforcing their rights under the agreement as a matter of right and law.⁴⁷ This is not an equitable standard and it is not up to the trial court's discretion to choose to award attorney's

⁴⁴Id.

⁴⁵R. at 303.

⁴⁶See, definitions of "default" supra.

⁴⁷Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985); Hackford v. Snow, 657 P.2d 1271, 1277 (Utah 1982); Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990), on remand, 840 P.2d 796, 809 (Utah App. 1992); Cobabe v. Crawford, 780 P.2d 834, 836 (Utah App. 1989).

fees once a default has been found. Even where a party seeks to avoid the contract, as is the case with the Hayes, he is still entitled to the recovery of his reasonable attorney's fees for enforcing the benefits of the agreement.⁴⁸

The purpose of the attorney's fee clause in the earnest money agreement is to protect someone in exactly the Hayes position. The Palmers have sought to circumvent the terms of the agreement by retaining the earnest money deposit and instituting a suit for damages. The only way that the Hayes could enforce their contractual rights was to incur attorney's fees in their defense to the present action. These fees were necessitated not at the instance of the Hayes but by the efforts of the Palmers to both have their cake and eat it too. The agreement specifically contemplates the recovery of attorney's fees by the Hayes in such a situation.⁴⁹

The trial court found that the Palmers had acted contrary to the terms and conditions of the earnest money agreement,⁵⁰ but nevertheless, declined the Hayes their attorney's fees. The trial court simply declined to label the Palmers' breach of the earnest

⁴⁸Clegg v. Lee, 516 P.2d 348, 353 (Utah 1973).

⁴⁹See supra, paragraph "N" of the earnest money agreement.

⁵⁰See, R. at 301-303.

money agreement a "default".⁵¹ The Hayes seek to have this Court rectify this verbal misconstruction and award them their reasonable attorney's fees incurred in defending against this unjustified suit.⁵²

D. Utah Code Ann. § 78-27-56.5 also provides for the recovery of the Hayes' attorney's fees.

Utah Code Ann. § 78-27-56.5 provides that:

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Because of the fairly recent adoption of this statute it has not yet been interpreted by either this Court or the Utah Supreme Court. All of the cases which cite the statute have found it inapplicable because they were dealing with contracts executed before April 28, 1986.⁵³ The intent of the statute, however, is clear from its wording. The statute contemplates a situation where one party will be entitled to recover their attorney's fees based

⁵¹See, R. at 303-304.

⁵²"Provisions in written contracts providing for the payment of attorney fees should ordinarily be honored by the courts." Cobabe v. Crawford, 780 P.2d 622, 625 (Utah App. 1989); accord, Soffe v. Ridd, 659 P.2d 1082, 1085 (Utah 1983); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988).

⁵³Saunders v. Sharp, 840 P.2d 796, 809 nt.6 (Utah App. 1992); Carr v. Enoch Smith Co., 781 P.2d 1292, 1296 nt.5 (Utah App. 1989); Cobabe v. Crawford, 780 P.2d 834, 836 nt.2 (Utah App. 1989).

upon a provision of a written contract if they prevail on the merits of their claim. In such a case the legislature wished to confer equitable discretion upon the courts to award attorney's fees to the other side if they should prevail in the lawsuit even if the contract only provided for attorney's fees to one side.

The Palmers would clearly have been entitled to recover their attorney's fees had they prevailed in the court below. Their suit was to recover damages based upon the alleged default of the Hayes. Had this alleged default been proven the attorney's fee clause⁵⁴ would have been triggered in favor of the Palmers. If the trial court's conclusion that the actions of the Palmers did not constitute a default of the earnest money agreement is upheld then the Hayes will not be able to recover their attorney's fees based on the contract despite prevailing on the merits of the case. This is precisely the type of inequity that § 78-27-56.5 was designed to rectify. Even if the actions of the Palmers are found not to be within the definition of "default" as that term is used in the earnest money agreement, this Court should nevertheless award the Hayes their attorney's fees incurred in this action based on the discretion conferred upon the Court by § 78-27-56.5.

⁵⁴Paragraph "N" of the earnest money agreement, supra.

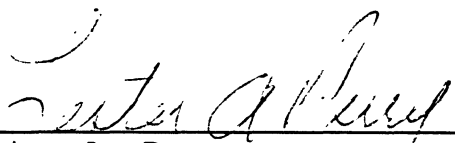
CONCLUSION

The Palmers failure to tender a refund of the earnest money prior to bringing suit for damages and their instruction to their broker not to release the money constitute, as a matter of law, an election of the remedy of liquidated damages. Thus, any suit for actual damages is precluded. The Palmers have defaulted under the earnest money agreement by bringing suit for actual damages, entitling the Hayes to recovery of their reasonable attorney's fees in defending against this action.

The Hayes respectfully request that this Court affirm the summary judgment below as to the issue of election of remedies and reverse as to the issue of attorney's fees and remand with instructions that the trial court issue an order awarding the Hayes their reasonable attorney's fees incurred in this action both at the trial court level and on appeal.

DATED this 22nd day of July, 1994.

KESLER & RUST



Lester A. Perry
Attorney for Defendants/
Appellees

h:\kmw\hayes\brief

ADDENDUM

- A. Letter of Edward T. Hayes to Maple Hills Realty dated February 8, 1993. (Record at 107.)
- B. Letter of Michael D. Blackburn to Maple Hills Realty dated March 8, 1993. (Record at 108.)
- C. Memorandum Decision of April 1, 1994. (Record at 296-305.)

Tab A

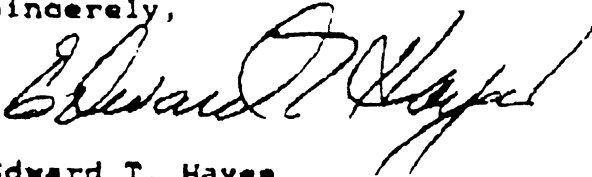
February 8, 1993

Maple Hills Realty
460 South 100 East
Bountiful, UT 84010

Dear Mr. Marshall:

After reviewing the document that was brought to our office regarding the disposition of our deposit, I regret to inform you that I will be unable to sign it. My understanding of the law is that the only person who could have claim on the money would be the Palmers. If they have such a claim, please advise me. You, on the other hand, have no legal right to make conditions under which the deposit would be returned. I suggest strongly that you either forward the money immediately or let me know that the Palmers have requested that it not be returned for some reason.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edward T. Hayes".

Edward T. Hayes

Tab B

LAW OFFICES

SNOW, CHRISTENSEN & MARTINEAU

10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-0000
FACSIMILE (801) 363-0400

THURMAN & SUTHERLAND	1986
THURMAN, SUTHERLAND & KING	1988
THURMAN, WEDGWOOD & IRVINE	1906
IRVINE, SKEEN & THURMAN	1923
SKEEN, THURMAN, WORSLEY & SNOW	1952
WORSLEY, SNOW & CHRISTENSEN	1967

J. MARTINEAU	DAVID J. CASTLETON
T. L. FOELMAN	DAVID W. SLAUGHTER
W. M. BERRY	STANLEY J. PRESTON
ES CLEGG	JOY L. CLEGG
W. SLAGLE	SHAWN E. DRANEY
MIS NORTON	JERRY D. FENN
L. LARSON	JOHN R. LUND
L. GATES	RYAN E. TIBBITTS
NT STEPHENS	ANNE SWENSEN
WILSON	ROONEY R. PARKER
EL R. CARLSTON	RICHARD A. VAN WAGONER
G. WILLIAMS	DAVID W. STEFFENSEN
MAIDEN	ROBERT C. KELLER
WHEELER	ELIZABETH KING
I. GRAF	MARC T. WANGSGARD
EL D. BLACKBURN	CAMILLE N. JOHNSON
IT H. HENDERSON	TERENCE L. ROONEY
EN J. HILL	THOMAS F. TAYLOR
K. CHAI II	DENNIS V. DAHLE
D. PANZER	PAUL S. EVANS
BY K. STOLL	JEFFREY H. HAGEN

March 8, 1993

JOHN H. SNOW 1917-1990

OF COUNSEL
CAROL G. CHRISTENSEN
MERLIN R. LYBBERT
JOSEPH NOVAK
SCOTT DANIELS
BRYAN A. GEDURTS

WRITER'S DIRECT NUMBER:

(801) 322-9123

Ron Marshall
Maple Hills Realty
460 South 100 East
Bountiful, Utah 84010

Dear Mr. Marshall:

It is unfortunate that the potential sale to Ed and Stephanie Hayes could not be concluded.

We have been informed that you retain a \$2,000.00 earnest money deposit in your trust account. We also understand that Mr. and Mrs. Hayes have requested a refund of this deposit. Demand is hereby made that this money not be removed from the trust account for any reason without the prior written permission of Kenneth F. and Rebecca A. Palmer.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Michael D. Blackburn

MDB:skm

Tab C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KENNETH F. PALMER, JR., and
REBECCA A. PALMER, husband
and wife,

Plaintiffs,

vs.

EDWARD HAYES and STEPHANIE
HAYES, husband and wife,

Defendants.

: MEMORANDUM DECISION

:

: CASE NO. 930905590

:

:

:

FILED IN DISTRICT COURT
Third Judicial District

APR 1 1994

SALT LAKE COUNTY

Deputy Clerk

Before the Court is the defendants Hayes' Motion for Summary Judgment. The parties appeared through counsel on March 28, 1994, and argued their respective positions. Following oral argument, the Court took the matter under advisement to further consider the written submissions of the parties and to consider in more detail the decisions of the appellate courts of this state relating to election of remedies. Since having taken the Motion under advisement, the Court has had an opportunity to once again review the legal Memoranda of the parties and to review closely the decisions of the appellate courts relating to election of remedies, and being otherwise fully advised, enters the following Memorandum Decision.

This is a case where the plaintiffs (sellers) sued the defendants (buyers) for damages resulting as a result of the

defendants' alleged breach of contract in connection with the purchase of the plaintiffs' home. The defendants' Motion for Summary Judgment asserts that this action must be dismissed against the defendants on the basis that pursuant to the contract sued upon by the plaintiffs, the plaintiffs have elected a remedy of retaining the earnest money payment of the defendants to the plaintiffs, and under the terms of the contract are therefore prohibited from suing the defendants for damages.

While there are a number of disputed issues in this case, it is not disputed that the parties had between them a customary Earnest Money Sales Agreement that included in paragraph "N" therein, the following:

In the event of default by buyer, seller may elect to either retain the earnest money as liquidated damages, or to institute suit to enforce any rights of seller.

While the defendants deny that they breached the Earnest Money Agreement by failing to complete the transaction in this matter, they argue for purposes of this Motion that even if they did default as plaintiff alleges, the plaintiffs have elected their remedy of retaining the \$2,000 earnest money originally deposited by the defendants with the plaintiffs' real estate agent. (Much has been made by the plaintiffs in oral argument that the plaintiffs and defendants utilized the same real estate brokerage-

each had different agents within that brokerage, but the Court is satisfied that such a circumstance does not alter the result in this case.) The defendants further argue that the plaintiffs' election to retain the \$2,000 earnest money as liquidated damages prohibits the plaintiffs from filing this suit, which was done on September 28, 1993 on the theory that the plaintiffs have elected a remedy against the defendants other than a suit for damages in accordance with the aforementioned contractual provision.

Assuming for the sake of this Motion only that the defendants defaulted under their obligations contained in the aforementioned Earnest Money Agreement, the plaintiffs had two options under the contract. Either the plaintiffs could elect to retain the \$2,000 earnest money as liquidated damages, or they could file a lawsuit seeking damages. It is clear under principles of law relating to election of remedies and under the contract provisions that the plaintiffs may not do both.

As indicated originally, and it is apparently without dispute, the earnest money deposited by the defendants was being held by the real estate brokerage firm, Maple Hills. Following the refusal of the defendants to continue with the property sale transaction, the defendants demanded from the real estate brokerage, the return of their earnest money. In response thereto, the real estate

brokerage prepared a Release of Earnest Money Deposit, which purported to release the real estate brokerage from any claims that either the plaintiffs or the defendants may have had against it as a result of the manner in which the real estate brokerage and its agents in representing both the plaintiff and the defendant may have conducted themselves.

The documentation before the Court in connection with this Motion shows that one of the defendants Hayes refused to sign the Release, which included a release of claims that it may have against the Maple Hills real estate brokerage. Under cover of a letter, dated February 8, 1993, to Maple Hills Realty, the defendant Mr. Hayes advised Maple Hills Realty that the attempt of Maple Hills to insert conditions for the return of the deposit protecting Maple Hills was inappropriate, and requested that the deposit be returned as previously requested, or that the defendants be advised of the plaintiffs' (the sellers) claims against the earnest money. Maple Hills did not return the funds prior to March 8, 1993 when it received correspondence from attorney Michael D. Blackburn, representing the sellers, that the realty company was not to return the earnest money to the Hayes who had made a request for a refund, and finally that the funds not be disbursed in any fashion without the prior written permission of the sellers.

Thereafter, Maple Hills real estate brokerage deposited the money into the Circuit Court in Davis County and through stipulation the monies were transferred to the Third District Court.

Plaintiffs argue that they did not retain the \$2,000, but rather it was retained by the real estate agent and brokerage firm, Maple Hills. There is nothing in the record to suggest that the reasons for Maple Hills' refusal to return the funds were anything other than the instructions from the plaintiffs that it was not to release the funds. Plaintiffs' counsel argues that Maple Hills would not have released the funds, even if the Palmers had directed them to do so, without the Palmers and the Hayes executing the release in favor of Maple Hills. Unfortunately, the Court has not been directed to any portion of the record that would so suggest, and Mr. Blackburn's letter on behalf of the Palmers to Maple Hills does not suggest that the reason they are instructing Maple Hills to retain the sums rather than to return them to the Hayes is because of Maple Hills' insistence on a release. Mr. Blackburn's letter on that subject to Maple Hills is silent.

The cases which deal with this issue from the Utah Supreme Court include cases where the earnest money deposit was being held

by a real estate agent. The fact that the funds were being held by the real estate agent for the plaintiffs does not in the Supreme Court decisions mean that the plaintiffs did not retain control.

It would appear from a review of the reading of the Supreme Court decisions that a failure to tender the earnest money back to a defaulting purchaser constitutes an election to retain the earnest money as liquidated damages in lieu of suing for what damages might be proven. The wording of the Supreme Court decisions seems to suggest that there is an affirmative obligation to tender the sums back on the part of persons such as the plaintiffs who are required to make an election of their remedy. There is no evidence that the plaintiffs ever tendered the \$2,000 to the Hayes so as to show a non-election of liquidated damages provision of the Earnest Money Agreement, but to the contrary, affirmative actions on the part of the plaintiffs directed their agent, Maple Hills, not to disburse the funds. If such conduct does not constitute a constructive, informed decision to elect the remedy of retention of the earnest money as liquidated damages, then certainly it leads the Court to a conclusion that a constructive retention of liquidated damages occurred, thus binding the plaintiffs to the decision to elect the remedy of retention of the earnest money.

The fact that the defendants have not made repeated requests for return of the earnest money is not fatal to the defendants' position. This Court is unable to find anything in the reported decisions that would suggest that repeated requests for return of the funds is necessary. In fact, the decisions do not necessarily require that there even be a demand on the part of allegedly defaulting parties for return of earnest money, but rather the obligation appears to be upon the non-breaching party to make tender of the earnest money so as to attempt to refund the same, to avoid the election of that remedy.

In the final analysis, the plaintiffs by instructing their agent, Maple Hills, to retain the earnest money paid by the defendants, elected the remedy of retaining the earnest money as liquidated damages and therefore forfeited the alternative election of suing the defendants in damages. Plaintiffs' argument that they never would have made such an election, because of the large damages they claim to have suffered as a result of the defendants' alleged breach, is not persuasive. Whether or not the plaintiffs consciously determined to select the remedy of retaining the earnest money as liquidated damages is unimportant when their conduct is such that they have retained the funds and have therefore, advisedly or not, elected that remedy.


Based upon the foregoing and those other arguments suggested by the defendants in their moving papers, and as suggested at oral argument, the Court is compelled to grant the defendants' Motion for Summary Judgment as to the plaintiffs on the basis that the plaintiffs have elected the remedy of retention of the earnest money as liquidated damages, and have therefore foregone their right to file this suit as to these defendants. The Court has been advised that there is a request to amend the pleadings to join Maple Hills real estate brokerage firm as a party defendant, and this Summary Judgment will, of course, not affect that request.

The defendants further seek attorney's fees in this matter on the basis of the aforementioned paragraph "N" of the Earnest Money Agreement. The aforementioned paragraph allows attorney's fees against a defaulting party under the terms of the Earnest Money Agreement. While the defendants have prevailed in convincing the Court that this lawsuit against them should be dismissed on the basis that the plaintiffs have elected a remedy of retention of the earnest money, that decision does not lead this Court to the conclusion that the plaintiffs have defaulted under the terms of the Agreement. They have elected to attempt to pursue a remedy to which they are not entitled, but they have not "defaulted" under the Earnest Money Agreement. There apparently being no other basis

upon which the defendants seek attorney's fees, and the Court having determined that the contract does not allow attorney's fees, except in circumstances of "default", the defendants' request for attorney's fees must be refused.

Counsel for the defendants is instructed to prepare an appropriate Order granting Summary Judgment for the reasons set forth in this Memorandum Decision, and that Order and Judgment is to include this Court's decision as it relates to the question of attorney's fees. The form of Order is then to be submitted to counsel for the plaintiffs, who is to review the same for form and if proper in form, submit the same to the Court for review and signature, all in accordance with the Code of Judicial Administration.

Dated this 1st ~~7~~ day of ^{April} ~~March~~, 1994.




TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 1 day of ~~March~~ ^{April}, 1994:

Robert H. Henderson
Attorney for Plaintiff
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

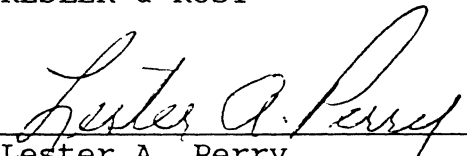
Lester A. Perry
Attorney for Defendant
36 S. State Street, Suite 2000
Salt Lake City, Utah 84111

 _____

CERTIFICATE OF MAILING

I certify that on the 22nd day of July, 1994, I served four true and correct copies of the foregoing Brief of Appellees by first class mail, postage prepaid, to the following: Robert H. Henderson, SNOW, CHRISTENSEN & MARTINEAU, Attorneys for Plaintiffs/Appellants, 10 Exchange Place, Eleventh Floor, Post Office Box 45000, Salt Lake City, Utah, 84145.

KESLER & RUST



Lester A. Perry
Attorney for Defendants/
Appellees