

1994

Lan C. England v. Eugene Horbach, an individual, Medicode, Incorporated, a Utah corporation, and Does I through V : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LAN C. ENGLAND,

Plaintiff/Appellant

vs.

EUGENE HORBACH, an individual,
MEDICODE, INCORPORATED, a
Utah corporation, and DOES I
through V,

Defendants/Appellees

Case No. 940695-CA

(Priority No. 15)

BRIEF OF THE APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE J. DENNIS FREDERICK

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO.

940695

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Utah Court of Appeals

FEB 21 1995

Marilyn M. Branch
Clerk of the Court

LAN C. ENGLAND,
Plaintiff/Appellant
vs.
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Defendant/appellee Eugene Horbach ("Horbach") respectfully submits this brief in response to the Brief of plaintiff/appellant Lan C. England ("England").

JURISDICTION

On November 14, 1994 the Utah Supreme Court transferred this matter to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

None of the arguments upon which England attempts to base his appeal were raised before the trial court. Therefore, in addition to the issues identified in England's Brief, this appeal also presents the issue of whether the Court of Appeals may reverse the trial court based upon arguments raised for the first time on appeal.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES, AND RULES

During trial, the trial court granted Horbach's motion to amend the pleadings to conform to the evidence. That amendment, which England challenges in section VI. of his Brief, is governed not by Rule 15(a) of the Utah Rules of Civil Procedure, but by Rule 15(b),¹ pursuant to which a trial court must allow amendment of the

¹Rule 15(b) reads as follows:

Amendments to conform to evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If

pleadings to include issues tried by the express or implied consent of the parties. (See discussion at pp. 19-21 below.)

STATEMENT OF THE CASE

On May 23, 1991 England told Horbach that Horbach still owed \$25,000 under a stock purchase agreement the parties had made in late 1989. This was incorrect. In the stock purchase agreement Horbach had agreed to purchase certain stock from England for \$710,498.25, and by May 23, 1991 Horbach had already made payments totalling \$855,000. Therefore, rather than owing \$25,000, Horbach had overpaid by \$144,501.75. However, because neither party had kept track of Horbach's payments, England mistakenly stated, and Horbach mistakenly believed, that \$25,000 remained owing.

Based on this mistake, Horbach agreed to give England an additional \$25,000 and an interest in 2% of the stock,² and England conveyed the stock to Horbach. Horbach paid the additional

evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

Utah R. Civ. P. 15(b)(1994).

²The parties disputed the exact nature of this interest. England claimed that Horbach agreed to convey the 2% of the stock to England outright. By contrast, Horbach claimed he had merely granted a security interest in the 2% of the stock to secure payment of the additional \$25,000 which he mistakenly believed he owed. This dispute regarding precisely what Horbach agreed to convey is, however, mooted by the trial court's holding that the agreement is unenforceable because it was based on a mutual mistake and was unsupported by consideration.

\$25,000--making his total payment \$880,000 and his over-payment \$169,501.75. However, England initiated the action below in an attempt to force Horbach to also convey the 2% of the stock.

At trial, England introduced into evidence Horbach's \$880,000 of payments, and conceded that as of May 23, 1991 Horbach had already paid the entire contractual stock purchase price of \$710,498.25. Therefore, the trial court held that England was merely fulfilling a pre-existing contractual duty when he conveyed the stock to Horbach on May 23, 1991, and that no new consideration supported Horbach's agreement to give England another \$25,000 or any interest in 2% of the stock. The trial court further held that the May 23, 1991 agreement was based on the parties' mutual mistake regarding the amount Horbach had paid. On these two bases--lack of consideration, and mutual mistake--the trial court held the agreement unenforceable, denied England's claim for the 2% of the stock, and granted Horbach's counterclaim to recoup his \$169,501.75 overpayment.

RELEVANT FACTS

The May 23rd Agreement

In late 1989 England and Horbach entered into a stock purchase agreement whereby Horbach agreed to purchase from England 258,363 shares of stock in Medicode, Inc. for \$710,498.25. (Record ("R.") 256, 488, 531³, 572). Beginning on December 29, 1989, Horbach made numerous payments to England, but failed to keep an accurate

³Page 531 of the Record should be page 85 of the Trial Transcript. That page is missing from the official copy of the Record, and is therefore attached hereto as Exhibit A.

account of those payments. (R. 256, 576). By September 14, 1990 Horbach had mistakenly paid a total of \$855,000, which was \$144,501.75 more than the contractual stock purchase price. (R. 256, 257, 539-540).

On May 23, 1991 the parties met to finalize the stock purchase. (R. 257, 505). England conceded at trial that as of May 23, 1991 Horbach had already overpaid the agreed stock purchase price. (R. 539-540). However, England had also failed to keep an accurate account of the payments he had received; he testified at trial that on May 23, 1991 he believed he was still owed between \$25,000 and \$75,000. (R. 517). England further testified that during the May 23, 1991 meeting he told Horbach that an additional \$25,000 was owed. (R. 517-518).

At the May 23, 1991 meeting, Horbach mistakenly believed England's statement that he still owed \$25,000 of the \$710,498.25 purchase price specified in the 1989 stock purchase agreement. (R. 257, 577). Based on this mistake, Horbach agreed to pay England an additional \$25,000 and to give England an interest in 2% of the Medicode stock, and England agreed to immediately convey his Medicode stock to Horbach (the "May 23rd Agreement"). (R. 257-258, 506, 518, 577).

Horbach subsequently paid England the additional \$25,000. (R. 258, 512⁴). This payment brought Horbach's total payment to England to \$880,000, which was \$169,501.75 in excess of the

⁴Page 512 of the Record should be page 66 of the Trial Transcript. That page is missing from the official copy of the Record, and is therefore attached hereto as Exhibit B.

\$710,498.25 contractual purchase price. (R. 258). Nevertheless, England demanded that Horbach also reconvey 2% of the Medicode stock. (R. 512). Horbach refused, and England filed his complaint initiating the action below on March 15, 1993. (R. 2-18).

Horbach's Discovery Of His Overpayment Of England

On December 14, 1993, Horbach informed the trial court that he had recently discovered evidence regarding his overpayment of England. Horbach moved the trial court for leave to amend his answer to include a counterclaim to recoup this overpayment.⁵ Horbach also moved the trial court to continue the trial date and to allow further discovery into this overpayment issue.⁶

England resisted the motion for a continuance, representing that he "is presently prepared to proceed to trial on this matter."⁷ England also opposed England's motion for leave to file a counterclaim on two grounds: (1) that "at the pretrial settlement conference, Horbach was authorized to file a Motion for Continuance but not a Motion for Leave to File a Counterclaim," and (2) that "untimely motions to file counterclaims must be denied."⁸ The trial court denied Horbach's motion on December 20, 1993. (R. 199-200). Nevertheless, on February 4, 1994 England served

⁵Motion For: Continuance Of Trial, Leave To File Counterclaim, And To Extend Discovery Period. (R. 184-189).

⁶Id.

⁷Memorandum in Opposition to Defendant Horbach's Motion for Continuance of Trial, Leave to File a Counterclaim, and to Extend Discovery Period at 2. (R. 193-198).

⁸Id. at 4.

interrogatories on Horbach asking him to explain the basis of his proposed counterclaim that he had overpaid England. (R. 206-207; Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant Eugene Horbach at 6 (attached hereto as Exhibit C)).

The Trial Below

This matter was tried to the court below on March 22, 1994. In Horbach's Trial Memorandum, hand-delivered to England the morning of trial, Horbach argued that the pleadings should be amended to include a counterclaim for recoupment of his overpayment. (R. 228-230). Horbach's counsel then explicitly addressed the overpayment issue in his opening statement as follows:

When we're through here, we're going to be seeking to ask the Court to modify the pleadings to conform to the evidence. We think that Mr. Horbach is due back about \$350,000 that he's overpaid Mr. England, but that will come out when you see the evidence as it comes in.

(R. 452-453). Furthermore, at the close of England's case in chief, Horbach's counsel moved for a directed verdict and stated that "the only issue left is what is the amount of the overpayment in terms of our ability to get it back from them." (R.565).

At trial, England never opposed amending the pleadings; nor did he suggest that he was unprepared for, or would in any way be prejudiced by, the trial of Horbach's counterclaim. Rather, England's counsel acknowledged in his opening statement that "there's been a recent defense raised that Mr. England was way overpaid for the stock in the amount of about \$200,000." (R. 450).

England's counsel and stated that in order to respond to the issue of overpayment,

we will have to complicate the case a little bit and have Mr. England give background on that issue and he will do that in his testimony.

(R. 450 (emphasis added)). England then himself put into evidence all of Horbach's \$880,000 in payments which demonstrated the \$169,501.75 overpayment. (R. 241, 539-540). England never objected to the introduction of evidence regarding Horbach's overpayment. Nor did he propose that his own evidence regarding Horbach's \$880,000 in payments should be admitted only on the limited issue of whether Horbach had made payment in full, rather than the additional issue of whether Horbach had overpaid.

At the close of evidence, Horbach's counsel formally moved to conform the pleadings to the evidence which had been adduced. (R. 598). The trial court noted that he had taken note of Horbach's request in his Trial Memorandum to amend the pleadings to add a counterclaim for recoupment of the overpayment. (Id.). England again failed to oppose Horbach's motion, or to make any objection to the requested amendment.

The trial court found that as of May 23, 1991, Horbach had overpaid England by \$144,501.75, but that the parties both mistakenly believed that \$25,000 remained owing, and entered into the May 23rd Agreement on the basis of that mutual mistake. (R. 257-258). The trial court further found that Horbach subsequently paid England an additional \$25,000, bringing his total overpayment to 169,501.75. (R. 258).

Based upon these findings, the trial court concluded that "[a]s of May 23, 1991, [Horbach] had fully performed his obligations under the 1989 stock purchase agreement," and that England therefore "was legally obligated to convey his 258,363 shares of Medicode to" Horbach. (R. 258-259). The trial court concluded that when England agreed to immediately convey his stock to Horbach he was merely agreeing to perform "a preexisting duty," and that this did not provide any consideration to support the May 23rd Agreement. (R. 259). The trial court also concluded that the May 23rd Agreement was unenforceable as a result of the parties' mutual mistake. (Id.). Finally, the trial court granted Horbach's motion to amend the pleadings, and awarded Horbach judgment on his counterclaim for the amount of his overpayment. (R. 259-260, 442).

At trial, England testified that he had made an agreement to perform certain services for Horbach, and that part of Horbach's payments to him were for those services rather than for the purchase of the Medicode stock. (R. 257). The trial court rejected England's testimony, holding that it was "not credible" on this point. (Id.). England also testified that it had been his "understanding" that the purchase price for the Medicode stock "was to be paid in two or three months."⁹ The trial court also rejected

⁹England testified as follows:

Q. What did Mr. Horbach say he was going to do in connection with the stock sale?

A. He said that he would be purchasing my stock at \$2.75 per share.

Q. And what did you say?

A. I agreed that that sounded fine and requested that it be done in short order and I expected that to be the first quarter.

this testimony, holding that although Horbach did not complete payment of the purchase price within two or three months, "[a]s of May 23, 1991, [Horbach] had fully performed his obligations under the 1989 stock purchase agreement." (R. 258-259).¹⁰

SUMMARY OF ARGUMENT

In sections I and II of his Brief, England attacks the trial court's holding that the May 23rd Agreement was unsupported by consideration. England argues that although he had a preexisting duty to convey the stock to Horbach, he sincerely (albeit mistakenly) believed that he did not, and that therefore his agreement to convey the stock constituted consideration. This argument fails for several reasons: (1) It ignores the trial court's alternative holding that the May 23rd Agreement is unenforceable on the basis of mutual mistake; (2) England's consideration argument is raised for the first time on appeal; and

. . . .
Q. Were any statements made about when that payment would be made, and if so, who made the statements?

. . . .
A. I'm having trouble answering this because I'm just trying to give a straightforward answer. It was my recollection and it is my understanding that it was to be paid in two or three months. I don't know how else to answer that.

(R. 490-491).

¹⁰England characterizes his own testimony on this point as "undisputed." (E.g., England's Brief at 10-11). However, as the Utah Supreme Court has held, "[t]he testimony of a party or other interested witness is not conclusive, even if it is not contradicted." Anderson v. State Farm Fire & Cas. Co., 583 P.2d 101, 104 (Utah 1978).

(3) surrender of an utterly baseless claim, even if sincerely believed, does not constitute consideration.

In section III of his Brief, England argues that even if the May 23, 1991 agreement is unsupported by consideration, it may be enforced under the doctrine of promissory estoppel. This argument fails for the following reasons: (1) It too is raised for the first time on appeal; (2) England's performance of a preexisting contractual duty does not constitute detrimental reliance; and (3) Horbach's mistake regarding his payments to England precludes him from being promissorially estopped.

Finally, in section IV of his Brief, England asserts that the trial court abused its discretion in granting Horbach's motion to amend the pleadings to conform to the evidence adduced at trial. England's argument fails for the following reasons: (1) England failed to assert any of the bases of this argument before the trial court; and (2) the overpayment issue was tried with England's implied assent, and the trial court therefore had no discretion in allowing an amendment.

ARGUMENT

When the decision of a trial court is reviewed on appeal, the Utah Court of Appeals will "presume [the decision] to be correct and search for grounds upon which [it] may be upheld." Allen v. Prudential Property and Cas. Ins. Co., 839 P.2d 798, 800 (Utah 1992). Therefore, the Court of Appeals will affirm "a trial court's decision whenever [it] can do so on a proper ground, even though it was not the ground on which the trial court relied in its

ruling." Bill Nay & Sons Excavating v. Neeley Constr. Co., 677 P.2d 1120, 1123 (Utah 1984). By contrast, the Court of Appeals will not reverse a trial court based upon "an issue raised for the first time on appeal." Wurst v. Department of Employment Sec., 818 P.2d 1036, 1039 (Utah App. 1991); see also John Deere Co. v. A & H Equip., Inc., 876 P.2d 880, 888 (Utah App. 1994) (appellant who "did not properly raise [an] issue at the trial court below" is "precluded from arguing it on appeal").

England asks this Court to reverse the judgment of the trial court on the basis of three legal arguments. However, England failed to raise any of those arguments before the trial court. Moreover, England's arguments are all legally untenable. The trial court's judgment must therefore be affirmed.

I. THE TRIAL COURT CORRECTLY HELD THAT THE MAY 23rd AGREEMENT IS UNENFORCEABLE

The trial court gave two alternative bases for its holding that the May 23rd Agreement is unenforceable. First, because Horbach had already "fully performed his obligations under the 1989 stock purchase agreement" England was "legally obligated to convey his 258,363 shares of Medicode stock to" Horbach, and England's performance of such a "preexisting duty does not provide consideration for a valid contract." (R. 258-259). Second, the May 23rd Agreement was unenforceable because it was executed under the parties' mutually mistaken belief that \$25,000 remained owing under the original stock purchase agreement. (R. 257, 259).

England challenges the first basis of the trial court's judgment--lack of consideration--in sections I and II of his Brief.

However, he simply ignores the second basis of the judgment--mutual mistake. The trial court must therefore be affirmed regardless of whether England's consideration argument might have any merit. Moreover, as discussed below, England's argument is legally fallacious.

A. The Judgment Of The Trial Court Must Be Sustained On The Ground Of The Parties' Mutual Mistake.

As noted above, the trial court's holding regarding the parties' mutual mistake provides an independently sufficient basis for the conclusion that the May 23rd Agreement is unenforceable. Nevertheless, England challenges neither the factual determination that the May 23rd Agreement was entered into on the basis of a mutual mistake,¹¹ nor the legal proposition that such a mistake renders the agreement unenforceable. See Neiderhauser Builders and Dev. Corp. v. Campbell, 824 P.2d 1193, 1198 (Utah App. 1992) (purported accord and satisfaction unenforceable if it was executed under a unilateral or mutual mistake). The judgment of the trial court must therefore be affirmed on the ground of mutual mistake, regardless of England's argument regarding consideration.

B. England Demonstrates No Error In The Trial Court's Judgment That The May 23rd Agreement Is Unsupported By Consideration.

Although England purports to challenge the trial court's judgment that no consideration supported the May 23rd Agreement, he does not dispute the premises of that judgment--that Horbach had already performed all of his contractual duties, and that England

¹¹The evidence introduced at trial not only supports the trial court's finding, but is undisputed on this point. (R. 532).

therefore had a preexisting duty to convey the stock. (R. 258-259).¹² England thus concedes, as he must, that on May 23, 1991 he had no legitimate basis for refusing to convey the stock to Horbach.

Nevertheless, England bases his appeal upon a new legal proposition: that consideration "may consist of a compromise of a *bona fide* dispute which is not necessarily well-founded but is in good faith." (England's Brief at 12 (quoting In re Grimm, 784 P.2d 1238, 1244 (Utah App. 1989)). England attempts to bring himself within this proposition by asserting that he believed that he was entitled to withhold the stock, and although this belief was mistaken, it was nonetheless "*bona fide*." (England's Brief at 11). This argument fails for a number of reasons discussed below.

1. England may not seek to have the trial court reversed with a consideration argument raised for the first time on appeal.

England's present argument--that his sincere but mistaken belief that he was not legally obligated to convey the stock to Horbach makes his agreement to do so sufficient consideration to support the May 23rd Agreement--was never raised before the trial court. The judgment of the trial court may not be reversed on the

¹²England conceded at trial that by May 23, 1991 Horbach had already paid him more than the contractual stock purchase price, (R. 539-540), and he does not dispute this fact on appeal. (England's Brief at 12 n.3). Moreover, although he claims to have believed "that he had no obligation to turn the stock over to" Horbach, he concedes that this "belief was wrong." (England's Brief at 11).

basis of such an argument raised for the first time on appeal. Wurst, 818 P.2d at 1039; John Deere, 876 P.2d at 888.¹³

2. There was no "dispute" at the May 23rd meeting, only a mutual mistake.

Furthermore, the proposition on which England attempts to rely--that the "compromise of a *bona fide* dispute" may provide consideration--is simply inapposite to the facts of this case as proven at trial. No evidence of any "dispute" was ever introduced. Rather, England testified that he told Horbach that \$25,000 remained owing, and Horbach testified that he believed this representation. (R. 517-518, 577). Here there was no "dispute," *bona fide* or otherwise, and England's consideration argument is therefore inapplicable. Instead, there was only a mutual mistake, and as discussed above, this provides an independent basis for the trial court's holding that the May 23rd Agreement was unenforceable.

3. The compromise of a wholly baseless position cannot constitute consideration.

Finally, the proposition upon which England attempts to rely--that the "compromise of a *bona fide* dispute which is not necessarily well-founded" constitutes consideration--is inapplicable to the "compromise" of a position as utterly baseless as was England's. By May 23, 1991, Horbach had already paid England \$855,000, which was \$144,501.75 more than the \$710,498.25

¹³Because this argument was not raised below, the purported sincerity of England's belief was never a material issue at trial, and therefore, was never challenged. This highlights the policy reasons for requiring a party such as England to raise all such arguments before the trial court.

purchase price. (R. 257). Therefore, England's supposed "belief" that he was still owed \$25,000 was completely baseless, and depended upon his continuing failure to simply add up the payments he had received from Horbach.

None of the cases which England cites found an enforceable accord and satisfaction where such a meritless position had been compromised. Rather, in In re Grimm, 784 P.2d 1238 (Utah App. 1989), this Court enforced an accord and satisfaction because it was supported by the compromise of "a legitimate controversy as to what assets" were subject to a trust. 784 P.2d at 1244. Likewise, in Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985), an accord and satisfaction was enforced because it was supported by the compromise of an apparently meritorious dispute over the quality of the performance of a contract. 699 P.2d at 731, 733.¹⁴

¹⁴Four of the other cases cited by England actually undercut his position. Thus, in Ashton v. Skeen, 39 P.2d 1073, 1077 (Utah 1935), the Utah Supreme Court refused to enforce a purported accord and satisfaction because no valid position had been compromised; the court did not address whether or not the appellant had a good faith belief in that position. In Neiderhauser Builders v. Campbell, 824 P.2d 1193, 1198 (Utah App. 1992), this Court held that "[w]hen there is a unilateral mistake, and a party accepts less than it is entitled to, the theory of accord and satisfaction will not prevent the mistaken party's recovery of the actual, correct amount." Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980), holds that where "the underlying claim is liquidated and certain as to amount, separate consideration must be found to support the accord; otherwise, the obligor binds himself to do nothing he was not already obligated to do, and the obligee's promise to accept a substitute performance is unenforceable." In Safety Fed. Sav. & Loan Ass'n v. Thurston, 648 P.2d 267, 270 (Kan. App. 1982), the Kansas court held that "[a]ny forbearance to prosecute or defend a claim or action . . . is usually a sufficient consideration for a contract based thereon, unless the claim or defense is obviously invalid, worthless or frivolous." (Emphasis added).

The remainder of England's cases are simply inapposite.

Therefore, these cases stand only for the proposition that a claim need not necessarily be a "winner" in order for the compromise of that claim to provide consideration supporting an accord and satisfaction. They do not support England's argument that consideration can be found in the "compromise" of a completely baseless claim. Rather, as noted in 15A C.J.S. § 11(d) (1967) at 211,

A mere belief on the part of a claimant that he has a claim, without any facts on which such belief may be founded, is not sufficient. . . . Good faith alone . . . has been held insufficient to support a compromise where the claim surrendered is wholly without foundation and not a doubtful one.

Therefore, even if England had raised this argument before the trial court, and even if there had been a "dispute" capable of being compromised, his purported belief that he was still owed \$25,000 was not merely not "well-founded," but was utterly devoid of foundation. England's "compromise" of this belief provides no consideration to support any accord and satisfaction.

For these reasons, the judgment of the trial court that the May 23rd Agreement is unenforceable must be affirmed.

II. THIS COURT MAY NOT REVERSE THE TRIAL COURT'S JUDGMENT THAT THE MAY 23RD AGREEMENT IS UNENFORCEABLE ON THE BASIS OF ENGLAND'S PROMISSORY ESTOPPEL ARGUMENT

In section III of his Brief, England argues that even if the May 23rd Agreement is unsupported by consideration, it should nevertheless be enforced under the doctrine of promissory estoppel. This argument fails for several reasons discussed below.

A. England May Not Seek To Have The Trial Court Reversed With A Promissory Estoppel Argument Raised For The First Time On Appeal.

England's promissory estoppel argument was never raised before the trial court, but is asserted for the first time on this appeal. Therefore, he may not ask this Court to reverse the judgment of the trial court on the basis of that argument. Wurst, 818 P.2d at 1039; John Deere, 876 P.2d at 888.

B. England Cannot Demonstrate Any Detrimental Reliance.

England concedes that detrimental reliance is an essential element of promissory estoppel, but argues that this element is satisfied by his agreement to convey the stock to Horbach on May 23, 1991. (England's Brief at 15-16). However, as the trial court concluded, England had a preexisting legal duty to convey the stock to Horbach. (R. 258-259). As a matter of law, the performance of such a preexisting duty cannot constitute detrimental reliance for the sake of a promissory estoppel claim. 80 Nassau Associates v. Crossland Federal Savings Bank, 169 B.R. 832, 842 (Bankr. S.D.N.Y. 1994) ("A party cannot assert estoppel, however, as a result of being 'induced' to do what he is already legally required to do."); In re Marriage of Neiss, 743 P.2d 1022, 1024 (Mont. 1987) (denying promissory estoppel claim where party has not done substantially more than he was already legally obligated to do). Therefore, even if England's promissory estoppel theory were properly before this Court, the judgment of the trial court could not be reversed on that theory.

C. Horbach's Mistaken Belief That He Still Owed England \$25,000 Precludes Promissory Estoppel.

Finally, the case on which England relies for the essential elements of promissory estoppel, Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171 (Utah App. 1993), provides that one of "[t]he factual prerequisites for promissory estoppel" is "that the defendants were aware of all the material facts." 848 P.2d at 175 (quoting Tolboe Constr. v. Staker Paving & Constr. Co., 682 P.2d 843, 845 (Utah 1984)). As the trial court found, on May 23, 1991 Horbach mistakenly believed that he still owed England \$25,000, when in fact he had already overpaid by \$144,501.75. (R. 257). Therefore, Horbach was clearly not "aware of all the material facts," and promissory estoppel is inapplicable.

III. THE TRIAL COURT PROPERLY GRANTED HORBACH'S MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE INTRODUCED AT TRIAL

A. England Made No Objection To Horbach's Rule 15(b) Motion Before The Trial Court, And May Not Do So For The First Time On Appeal.

In his Trial Memorandum, Horbach argued that he was entitled to restitution of his overpayment, and that the pleadings should be amended to include such a counterclaim. (R. 228-230). In his opening statement, Horbach's counsel stated that he intended to prove that England had been overpaid, and that he would ask the trial court to amend the pleadings to include Horbach's claim for the restitution of this overpayment. (R. 452-453). Then, in his motion for a directed verdict at the close of England's case, Horbach's counsel stated that "the only issue left is what is the amount of the overpayment in terms of our ability to get it back

from them." (R. 565). Finally, after the close of evidence, Horbach's counsel made a formal motion to have the pleadings conformed to the evidence. (R. 598). The trial court granted Horbach's motion, and gave him judgment on his counterclaim against England.

In section IV. of his Brief, England argues that the trial court abused its discretion when it granted Horbach's motion to amend. However, at no time during trial did England suggest any opposition to Horbach's motion to amend. Rather, all of England's arguments that granting the motion was unfairly prejudicial are raised for the first time on this appeal.¹⁵ Having failed to oppose England's motion to amend before the trial court, England may not raise this issue on appeal. Wurst, 818 P.2d at 1039; John Deere, 876 P.2d at 888.

B. Because The Overpayment Issue Was Tried By Consent It Would Have Been Error For The Trial Court Not To Grant Horbach's Motion For Leave To Amend.

Not only did England fail to object to Horbach's motion to amend, but he also made no objection to the presentation of the

¹⁵On December 14, 1993, Horbach had made a motion pursuant to Rule 15(a) of the Utah Rules of Civil Procedure to add a counterclaim for restitution of the overpayment. (R. 184-189). England opposed that motion on procedural grounds; he did not raise any of the arguments regarding prejudice which now appear in his Brief. (R. 193-198).

Although the trial court denied Horbach's Rule 15(a) motion, "a court's refusal to permit an amendment before trial under Rule 15(a) will not prevent the same amendment from being made under Rule 15(b) if the issue subsequently is tried with the consent of the parties." 6A Charles A. Wright, Arthur R. Miller and Mary K. Kane, Federal Practice and Procedure § 1493 (1990) at 51. Horbach's motion to amend at trial was governed by Rule 15(b), and as discussed in the text above, was wholly unopposed by England.

overpayment issue at trial. As discussed above, Horbach clearly announced his intention to try the overpayment issue. Rather than object that he was unprepared for or would be prejudiced by the trial of this issue, England's counsel acknowledged that the issue had been raised and stated that he would respond to it. (R. 450). Then England himself introduced all of the evidence demonstrating that he had been overpaid by \$169,501.75. England never suggested that this evidence should be admitted only as relevant to whether Horbach had paid in full, as opposed to whether Horbach had overpaid.

Because England never objected to trial of the overpayment issue, and because he himself introduced the evidence supporting Horbach's overpayment counterclaim, England implicitly consented to the trial of this issue. General Ins. Co. of Am. v. Carnicero Dynasty Corp., 545 P.2d 502, 506 (Utah 1976) ("Implied consent may be found where one party raises an issue material to the other party's case, or where evidence is introduced without objection."). Where as here an issue is tried "by the express or implied consent of the parties," Rule 15(b) makes it "mandatory for the trial court to grant leave to amend pleadings to conform to the evidence." Lloyd's Unlimited v. Nature's Way Mktg., Ltd., 753 P.2d 507, 509

(Utah App. 1988).¹⁶ Thus, it would have been reversible error for the trial court to have denied Horbach's motion to amend.¹⁷

On pages 20 through 22 of his Brief, England attempts to excuse his failure to object by arguing that he remained unaware throughout the trial that Horbach intended to counterclaim for restitution of the overpayment. This argument is ludicrous. As discussed above, Horbach repeatedly and explicitly announced his intention to try the overpayment issue and to counterclaim for the recoupment of that overpayment. England therefore cannot possibly have remained ignorant that Horbach intended to counterclaim, and that the overpayment issue was being tried. By failing to object, England implicitly consented to the trial of this issue, and his attempt to challenge the trial court's grant of Horbach's motion to amend is legally and factually baseless.¹⁸

¹⁶See also Loader v. Scott Constr. Corp., 681 P.2d 1227, 1229 (Utah 1984) (where issue not raised in the pleadings had been tried with the parties' implicit consent, "Utah R. Civ. P. 15(b) dictates that the issue should be treated as if it had been raised in the pleadings"); Carnicero, 545 P.2d at 506 ("[T]he first part of Rule 15(b) is not permissive in terms, for it provides that issues tried by express or implied consent *shall* be treated as if raised in the pleadings.").

¹⁷Because the granting of a motion to amend under the first part of Rule 15(b) is not discretionary, England's argument must be rejected without ever reaching the abuse of discretion issue. However, even assuming this issue were presented, on the facts of this case there cannot possibly have been an abuse of discretion: England had opposed further discovery regarding the overpayment issue (R. 193-198), represented to the trial court that he was ready to try this issue (R. 194, 450), and then himself introduced the evidence showing overpayment.

¹⁸England cites a number of cases as purported support for his attack on the trial court's grant of leave to amend. However, all of those merely upheld trial courts' exercise of discretion in denying motions to amend. Chadwick v. Nielsen, 763 P.2d 817, 820

CONCLUSION

For the reasons discussed above, England's appeal must be denied, and the judgment of the trial court affirmed.

DATED this 21st day of February, 1995

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(Utah App. 1988) ("we cannot say the trial court abused its discretion in denying Chadwick's motion to amend her complaint"); Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983) ("the court did not abuse its discretion in denying the motion to amend the complaint"); Alpine Credit Union v. Moeller, 656 P.2d 988, 989-90 (Utah 1982) ("The trial court did not abuse its discretion in denying appellant's motion to amend."); Trafton v. Youngblood, 442 P.2d 648, 658 (Cal. 1968) ("the trial court did not abuse its discretion in rejecting the amendment"). England fails to cite any case in which a trial court was held to have abused its discretion by granting such a motion.

On page 21 of his Brief, England represents that Trafton is "strikingly similar" to the instant case. However, as noted above, Trafton merely affirmed the trial court's denial of a motion to amend. Moreover, the motion to amend in Trafton was not made at trial, but only after the filing of the trial court's memorandum of decision. 442 P.2d at 657. Further, the amendment would have added an issue which "by the explicit agreement of the parties, was not before the court," and which the moving party had "renounced." 442 P.2d at 658.

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing BRIEF OF THE APPELLEE were hand-delivered this 21st day of February, 1995 to the following:

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Attorneys for Plaintiff



Exhibits

Exhibit A

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

* * *

LAN C. ENGLAND,

Plaintiff,

vs.

EUGENE HORBACH, MEDICODE
INCORPORATED,

Defendant.

TRIAL

Civil No. CIV 930901471 CV

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Tuesday, March 22, 1994

For the Plaintiff:

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For the Defendant
Horbach:

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COPY

EXHIBIT "A"

1 Mr. Horbach, would you have any argument that it's different,
2 or would you contend it's different than the 809,599.35?

3 A No, that would be correct.

4 Q Okay. Now, I'm going to assume for a second for
5 purpose of the question, I want to do the stock shares in
6 evidence and it's 258,363, correct?

7 A Correct.

8 Q The 2.75 a share, that was the agreed price?

9 A Correct.

10 Q So that equals \$710,498.25?

11 A Correct.

12 Q And that's what you had coming for those shares of
13 stock, isn't it? That's what you agreed to sell them for in
14 any event?

15 A Yes, in the initial agreement.

16 Q Okay. Now, if in fact the 64,000 or any part of it
17 and the 50,000 -- well, let me break it out here.

18 Let's assume that both of those are not included
19 for a minute.

20 A Okay.

21 Q Exclude both of them, which is essentially what
22 you've done on your chart, correct?

23 A Correct.

24 Q That would mean as of May 1981, you had been paid
25 \$695,000. Would you quarrel with that?

Exhibit B

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

* * *

LAN C. ENGLAND,

Plaintiff,

vs.

EUGENE HORBACH, MEDICODE
INCORPORATED,

Defendant.

TRIAL

Civil No. CIV 930901471 CV

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Tuesday, March 22, 1994

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EXHIBIT "B"

1 A Yes, I do.

2 Q And actually, there are four checks beginning on
3 page 25 and continuing through page 28; is that correct?

4 A Uh-huh (affirmative).

5 Q Is it your understanding that those were the checks
6 that were paid to you to make up this \$25,000 bounced check?

7 A Yes.

8 Q And the last payment is reflected on a check dated
9 2-17-92; is that correct?

10 A Yes.

11 Q Now, on the back of that check which is on page 28
12 of Exhibit P-1, there appear to be some handwritten words,
13 "Final payment for stock purchase."

14 A Yes.

15 Q Did you write those in?

16 A No, I did not. Mr. Horbach did.

17 Q At some point did you request that Mr. Horbach
18 deliver to you the two percent of the stock that's reflected
19 in the note, the handwritten note from the May meeting?

20 A Yes, I did.

21 Q Do you recall when that was?

22 A It's the December -- was it 1992? I think the
23 exhibits have been --

24 Q Well, let me provide you with what's been marked as
25 Plaintiff's Exhibit P-6. I'd ask you if you recognize

Exhibit C

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

LAN C. ENGLAND,	:	
	:	
Plaintiff,	:	PLAINTIFF'S FIRST SET OF
	:	INTERROGATORIES AND
vs.	:	REQUEST FOR PRODUCTION
	:	OF DOCUMENTS TO DEFENDANT
	:	EUGENE HORBACH
EUGENE HORBACH, an	:	
individual, MEDICODE,	:	
INCORPORATED, a Utah	:	Civil No. 930901471CV
corporation, and DOES I	:	
through V,	:	Judge J. Dennis Frederick
	:	
Defendants.	:	

Plaintiff Lan C. England propounds the following discovery requests to defendant Eugene Horbach. These discovery requests are to be answered pursuant to Rules 33 and 34 of the Utah Rules of Civil Procedure. Each request is continuing in

INTERROGATORY NO. 9: Please identify the complete basis for your contention that you may have overpaid Lan England in connection with your purchase of England's Medicode stock.

INTERROGATORY NO. 10: Please identify the complete basis for the Fourth Defense in your Answer to the Complaint that the "substitute agreement" should be dismissed because it violates the Rule Against Perpetuities.

INTERROGATORY NO. 11: Please identify the complete basis for your claim that the "substitute agreement" was not supported by consideration.

INTERROGATORY NO. 12: Please identify any and all litigation with which you were involved as of December 1, 1993, to the present, whether as a witness, a party or otherwise. Specify the court in which the case was or is pending, the name of the case, the case number, the judge presiding over the case, and the basic nature of the case.

INTERROGATORY NO. 13: Please identify all documents, including but not limited to, minutes of corporate meetings, corporate records or memoranda, which reflect or discuss in any way the transfer of Medicode stock from Lan England to you or your agreement to hold stock in trust for Lan England.

INTERROGATORY NO. 14: Please identify all persons involved in any internal review of your records to determine what consideration had been paid Lan England for shares of Medicode stock which you purchased.