

1995

Melvin Grossgold and Bruce Manka v. James C. Ziter : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Keith W. Meade, Esq.; Cohn, Rappaport & Segal; attorneys for appellants.

Ira B. Rubinfeld, Esq., Steven W. Call, Esq.; Ray, Quinney & Nebeker; attorneys for respondent.

Recommended Citation

Legal Brief, *Grossgold v. Ziter*, No. 950086 (Utah Court of Appeals, 1995).

https://digitalcommons.law.byu.edu/byu_ca1/6427

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCKET NO. 950086

IN THE UTAH COURT OF APPEALS

MELVIN GROSSGOLD and BRUCE
MANKA,

Plaintiffs/Appellants,

v.

JAMES C. ZITER,

Defendant/Seller.

Case No. 950086-CA

Priority No. 15

RESPONDENT'S PETITION FOR REHEARING

ON DECISION OF THE COURT OF APPEALS REVERSING AND
REMANDING A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH
(HONORABLE FRANK G. NOEL, JUDGE)

Keith W. Meade, Esq.
COHNE, RAPPAPORT & SEGAL
525 East 1st South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147
Telephone: (801) 532-2666

Attorneys for Plaintiffs/Appellants

Ira B. Rubinfeld, Esq. (A4244)
Steven W. Call, Esq. (A5260)
RAY, QUINNEY & NEBEKER
79 South Main Street, Suite 500
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Defendant/Respondent

FILED

OCT 26 1995

POINT OF APPEAL

IN THE UTAH COURT OF APPEALS

MELVIN GROSSGOLD and BRUCE
MANKA,

Plaintiffs/Appellants,

v.

JAMES C. ZITER,

Defendant/Seller.

:
:
:
:
:
:
:
:
:
:
:

Case No. 950086-CA

Priority No. 15

RESPONDENT'S PETITION FOR REHEARING

ON DECISION OF THE COURT OF APPEALS REVERSING AND
REMANDING A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH
(HONORABLE FRANK G. NOEL, JUDGE)

Keith W. Meade, Esq.
COHNE, RAPPAPORT & SEGAL
525 East 1st South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147
Telephone: (801) 532-2666

Attorneys for Plaintiffs/Appellants

Ira B. Rubinfeld, Esq. (A4244)
Steven W. Call, Esq. (A5260)
RAY, QUINNEY & NEBEKER
79 South Main Street, Suite 500
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Defendant/Respondent

TABLE OF CONTENTS

	PAGE NO.
TABLE OF AUTHORITIES	iv
I. STATEMENT OF ISSUES PRESENTED FOR REVIEW IN RESPONDENT'S PETITION FOR REHEARING	1
II. DISPOSITION AND RULING OF THE COURTS	1
A. DISPOSITION BY THE TRIAL COURT	1
B. DISPOSITION BY THE COURT OF APPEALS	2
III. ARGUMENT	3
A. THE COURT OF APPEALS MISAPPLIED THE LEGAL STANDARD OF INTERPRETATION TO BE GIVEN TO NEWLY ADDED WORDS TO THE PRE-PRINTED FORM <i>AGREEMENT</i>	3
B. THE AGREEMENT UNAMBIGUOUSLY PROVIDES THAT THE PROPERTY WAS SOLD "AS IS"	4
C. THE COURTS OF APPEALS' INTERPRETATION OF PARAGRAPH 6 FAILS TO RECOGNIZE THAT THE PRE-PRINTED WARRANTIES IN SECTION C HAD BEEN DISPLACED BY THE NEWLY ADDED TERMS TO THE AGREEMENT	4
D. THE COURT OF APPEAL'S RULING ALSO IGNORES THE EXPRESS TERMS OF THE <i>AGREEMENT</i> WHICH PREEMPTS THE BOILER PLATE LANGUAGE RELIED ON BY THE COURT . . .	6
E. THE <i>AGREEMENT</i> SHOULD BE INTERPRETED TO GIVE MEANING TO THE ADDED TERMS TO THE <i>AGREEMENT</i> THAT THE BOILER WAS NOT IN GOOD WORKING CONDITION . . .	7

F. AT A MINIMUM, THE <i>AGREEMENT</i> IS AMBIGUOUS	7
IV. CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<i>Bank of Ephraim v. Davis</i> , 559 P.2d 538 (Utah 1977)	3
<i>Faulkner v. Farnsworth</i> , 665 P.2d 1292 (Utah 1983)	8, 9
<i>Heiner v. S.J. Groves & Sons Co.</i> , 790 P.2d 107 (Utah 1990)	3
<i>Holland v. Brown</i> , 394 P.2d 77 (Utah 1964)	3, 5
<i>LDS Hospital</i> , 765 P.2d 857 (Utah 1988)	2
<i>Larrabee v. Royal Dairy Prods. Co.</i> , 614 P.2d 160 (Utah 1980)	2
<i>Rice, Melby Enterprises, Inc., v. Salt Lake County,</i> <i>Utah</i> , 646 P.2d 696 (Utah 1982)	8
<i>Williams v. First Colony Life Insurance Col.</i> , 593 P.2d 534 (Utah 1979)	8

Respondent James C. Ziter submits this *Petition for Rehearing* in compliance with Rule 35 of the *Utah Rules of Appellate Procedure*.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW IN RESPONDENT'S PETITION FOR REHEARING

Issue 1. Do the newly added words of disclaimer to paragraph 1(e) of the pre-printed *Agreement* supersede and displace the subsequent pre-printed language in paragraph 6 of the *Agreement* (which refers to the standard boiler plate warranties on the reverse side of the *Agreement*) on which the Court of Appeals based its *Memorandum Decision*?

Issue 2. If the newly added words of disclaimer in paragraph 1(e) of the *Agreement* do not supersede and displace the inconsistent boiler plate language in paragraph 6, is the *Agreement* ambiguous, and if so, did Court of Appeals intend by its *Memorandum Decision* to preclude the Trial Court from receiving extrinsic evidence on whether the parties intended the property to be sold "as-is"?

II. DISPOSITION AND RULING BY THE COURTS

A. DISPOSITION OF THE TRIAL COURT

After a close inspection of the *Agreement*, the Trial Court granted *Seller's Motion to Dismiss Appellant's Amended Complaint*. After reviewing controlling case law, the Trial Court held that the newly added words in paragraph 1(e) of

the *Agreement* superseded the other pre-printed terms on the *Agreement* particularly those general provisions which were in finer print on the backside of the *Agreement*. The Trial Court determined that the words "Buyer accepts property as is" were clear and unambiguous and precluded Buyers' alleged breach of warranty claims which were based on the boiler plate language on the backside of the *Agreement*.

B. DISPOSITION BY THE COURT OF APPEALS

On appeal, the Utah Court of Appeals reversed the decision of the Trial Court dismissing Buyer's Complaint. Judge Bench wrote the following *Memorandum Decision* for the Court in relevant part as follows:

Paragraph 1(e) when read in isolation, presents the possibility of some internal ambiguity. It provides as follows: "Buyer Inspection: Buyer has made a visual inspection of the property and subject to Section 1(C) above and 6 below, accepts it in its present physical condition, except: None. Buyer accepts property "as-is'" The trial court determined that the phrase "as-is" in paragraph 1(e) relieved Seller of all express warranties specified under Section C.

We are required, however, to examine the document in its entirety and in accordance with its purpose, giving effect to all of its parts. *LDS Hospital*, 765 P.2d at 858; *Larrabee v. Royal Dairy Prods. Co.*, 614 P.2d 160, 163 (Utah 1980). Paragraph 6 provides that "[i]n addition to warranties contained in Section C, the following items are also warranted: None. Exceptions to the above and Section C shall be limited to the following: None." According to the plain meaning of the contract, the parties agreed that there are no exceptions to the express warranties listed in Section C.

Accordingly, Section C warranties were not excluded and the trial court erroneously dismissed the case.

Reversed and remanded for further proceedings.

III. ARGUMENT

A. THE COURT OF APPEALS MISAPPLIED THE LEGAL STANDARD OF INTERPRETATION TO BE GIVEN TO NEWLY ADDED WORDS TO THE PRE-PRINTED FORM *AGREEMENT*

The Utah Supreme Court has stated that Utah courts are to interpret a contract to harmonize all of its parts and terms, and that each term of the contract should be given effect if possible, *See Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 110 (Utah 1990)(quoting *G.G.A., Inc. v. Leventis*, 773 P.2d 841, 845 (Utah App. 1989), so that all the separate parts of the contract harmonize with each other. (*Id.*). The Utah Supreme Court has further emphasized that newly added terms to a pre-printed form agreement supersede and displace any inconsistent pre-printed terms on the pre-printed form. *Bank of Ephraim v. Davis*, 559 P.2d 538 (Utah 1977); *Holland v. Brown*, 394 P.2d 77 (Utah 1964). In the present case, Petitioner contends that the Court of Appeals did not apply the foregoing cannons of construction in interpreting the *Agreement* for the following reasons:

B. THE AGREEMENT UNAMBIGUOUSLY PROVIDES THAT THE PROPERTY WAS SOLD "AS IS"

The *Agreement* unambiguously and expressly provides that the Property was sold "as is". (See *Agreement*, paragraph 1(e)). Paragraph 1(e) of the *Agreement* provides in relevant part:

Buyer inspection. Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below, accepts it in the present physical condition, except: None. Buyers accepts Property "as-is".

Agreement, paragraph 1(e)(Record at 006). The foregoing disclaimer terms were newly added terms to the pre-printed form *Agreement*. Consequently, the newly added disclaimer terms displaced and superseded all inconsistent pre-printed terms in the *Agreement*, including the fine language in paragraph 6 on which the Court of Appeals has based its entire decision (discussed next).

C. THE COURTS OF APPEALS' INTERPRETATION OF PARAGRAPH 6 FAILS TO RECOGNIZE THAT THE PRE-PRINTED WARRANTIES IN SECTION C HAD BEEN DISPLACED BY THE NEWLY ADDED TERMS TO THE AGREEMENT

In its ruling the Court of Appeals based its decision on the following language in paragraph 6 of the *Agreement*:

SELLERS WARRANTIES. In addition to warranties contained

in Section C, the following items are also warranted: None.

Exceptions to the above and Section C shall be limited to the following: None.

Agreement, paragraph 6 (Record at 007). The Court found that the foregoing reference to Section C manifested an intent by the parties to incorporate the standard boiler plate warranties. However, this is inaccurate. The newly added words, (which were made in the space on paragraph 1(e)), disclaimed the standard boiler plate warranties under subsection C. One of the very reasons why newly added terms displace inconsistent pre-printed terms on a form agreement is to eliminate the need of having to go through and strike out all inconsistent provisions in the pre-printed form. However, the legal effect is as if the inconsistent provisions had been stricken. To demonstrate the effect of the words displaced in paragraph 6 by the newly added terms of disclaimer made in paragraph 1(e), the words have been physically stricken as follows:

SELLERS WARRANTIES. ~~In addition to warranties contained~~

~~in Section C,~~¹ the following items are also warranted: None.

Exceptions to the above ~~and Section C~~² shall be limited to the following:

None.

When the foregoing section is accurately interpreted in conjunction with the newly added disclaimer terms in paragraph 1(e), it is clear that the word

¹This language was clearly displaced by the disclaimer terms in paragraph 1(e).

²*Id.*

"None" in paragraph 6 refers to the fact that there were no "Sellers Warranties" made by Respondent.

D. THE COURT OF APPEAL'S RULING ALSO IGNORES THE EXPRESS TERMS OF THE *AGREEMENT* WHICH PREEMPTS THE BOILER PLATE LANGUAGE RELIED ON BY THE COURT

Section 11 of the *Agreement* expressly indicates that the general provisions on the reverse side of the *Agreement* (which includes Section C) apply unless the parties have otherwise provided above in the *Agreement*. The section reads as follows:

11. GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

Agreement, paragraph 11 (capitalization not added) (emphasis added)(Record at 007). The *Agreement* expressly indicates in Section 1(e) that the parties did in fact indicate above³ that the Property would be sold "as is". Because the words "Buyer accepts property 'as is'" are contrary to subsection C of the General Provisions and because they are made above in paragraph 1(e), the subsection C warranties were not incorporated into the *Agreement* pursuant to the very terms of the *Agreement*.

³"Above" clearing refers to the preceding paragraphs 1 through 10.

E. THE *AGREEMENT* SHOULD BE INTERPRETED TO GIVE MEANING TO THE ADDED TERMS TO THE *AGREEMENT* THAT THE BOILER WAS NOT IN GOOD WORKING CONDITION

The terms added by the parties to the *Agreement* under paragraph 12 provide that Seller would give Buyer a \$5,000.00 discount if a new boiler was installed by Buyer by 9/15/92, which was after the closing was scheduled to occur. The added terms manifest that the parties considered the poor condition of the heating system before entering into the *Agreement*. If the parties had intended that the Seller warrant that the heating system was in good condition, as determined by this Court, no such additional provision regarding the boiler would have been necessary.

F. AT A MINIMUM, THE *AGREEMENT* IS AMBIGUOUS

The last two sentences of this Court's *Memorandum Decision*, dated October 12, 1995, read as follows:

According to the plain meaning of the contract, the parties agreed that there are no exceptions to the express warranties listed in Section C. Accordingly, Section C warranties were not excluded and the trial court erroneously dismissed the case.

Memorandum Decision at 2.

Respondent is fearful that the Trial Court will interpret the foregoing language as a legal conclusion by the Court of Appeals that warranties under

Section C were absolutely made by Respondent and that no parol or extrinsic evidence may be received by the Trial Court to determine the actual intent of the parties.⁴ Such a plausible interpretation of the *Memorandum Decision* would go beyond the intent of the Court's ruling and create an injustice for Respondent.⁵ Indeed, the Court of Appeals implied in its decision that the *Agreement* was ambiguous because the Court accepted "the factual allegations in the Complaint as true and consider them, and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." (*Memorandum Decision* at 1). The factual allegations in the Complaint and other extrinsic evidence considered by the Court were admissible, as a matter of law, only if the *Agreement* was determined initially to be ambiguous. *See Faulkner v. Farnsworth*, 665 P.2d 1292 (Utah 1983).⁶ Accordingly, Petitioner contends this is, at the least, a disputed issue, and that it would be improper for the Trial Court to be precluded from receiving

⁴The issue on appeal was whether the trial court had properly granted Seller's Motion to Dismiss the Complaint on the grounds that express warranties in the *Agreement* were excluded.

⁵Respondent will obviously testify at trial that the Property was intended to be sold "as-is" as reflected in paragraph 1(e) in the *Agreement*.

⁶"When a contract is clear on its face, extraneous or parol evidence is generally not admissible to explain the intent of the contract." *Faulkner v. Farnsworth*, 665 P.2d 1292 (1983) citing *Rice, Melby Enterprises, Inc., v. Salt Lake County, Utah*, 646 P.2d 696 (Utah 1982); *Williams v. First Colony Life Insurance Co.*, 593 P.2d 534 (Utah 1979).

parol evidence as to the intent of the parties in making the *Agreement*.

Accordingly, if the Court of Appeals rejects Petitioner's arguments in Point I for reconsideration and reversal, then the provisions of paragraph 6 of the *Agreement* are, at a minimum, ambiguous when read in conjunction with: (1) the newly added words of disclaimer in paragraph 1(e), (2) the terms relating to the poor condition of the boiler and (3) the terms of paragraph 11. Because the *Agreement* is ambiguous, extrinsic evidence should be received by the Trial Court to determine the intent of the parties.⁷ Therefore, Respondent petitions the Court of Appeals, in the alternative to reversal, for an order modifying or clarifying it *Memorandum Decision* to provide that the *Agreement* is indeed ambiguous and that the Trial Court may receive extrinsic evidence to determine whether the parties intended the Property to be sold "as is".

IV. CONCLUSION

When a party signs a pre-printed form contract that expressly adds language that the property is sold "as is", adds the term "None" in the space next to "Seller's Warranties" and expressly provides the Buyer an opportunity to gain credit for replacing the boiler, reasonable minds can not differ that Seller did not

⁷ See *Faulkner v. Farnsworth*, 665 P.2d 1292 (1983) (When contract is ambiguous, because of uncertain meaning of terms, missing terms, or other facial deficiencies, parol evidence is admissible to explain parties' intent.)

agree to make boiler plate warranties that the heating and plumbing systems were in fact in good working condition. The interpretation given to paragraph 6 by the Court of Appeals fails to recognize the preemptive effect of the newly added disclaimer terms under paragraph 1(e) on the pre-printed terms in paragraph 6 on which the Court of Appeals based its decision.

WHEREFORE, the *Memorandum Decision* of the Court of Appeals should be reconsidered to affirm the Trial Court's interpretation in giving meaning to the added terms of the *Agreement* that the property was sold "as is", in preempting and displacing all inconsistent terms in the *Agreement* including the fine language in paragraph 6 on which the Court of Appeals has based its entire decision.

In the alternative, Petitioner prays the Court of Appeals to modify its *Memorandum Decision* to clarify that at the very least the *Agreement* is ambiguous and the Trial Court should receive extrinsic evidence to determine the intent of the parties on whether they intended that the property be sold "as is". Only then can the parties and the Trial Court know the scope of the "further proceedings" to be undertaken on remand.

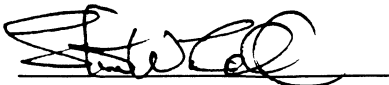
DATED this 26th day of October, 1995.

RAY, QUINNEY & NEBEKER

By 
Ira B. Rubinfeld
Steven W. Call

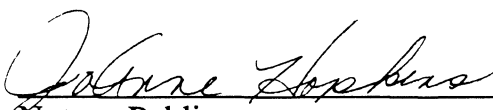
CERTIFICATION OF GOOD FAITH FILING

Pursuant to Rule 35(a) of the Utah Rules of Appellate Procedure, Counsel for Respondent and Petitioner hereby certifies under oath that this *Petition for Rehearing* is made and submitted in good faith and not for the purpose of delay.

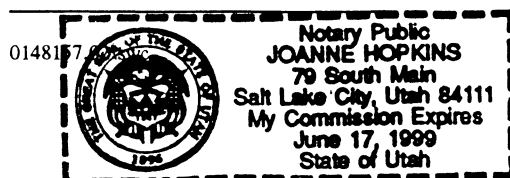

Steven W. Call

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN to before me this 26th day of October, 1995 by Steven W. Call.


Notary Public
Residing at: Salt Lake City, UT

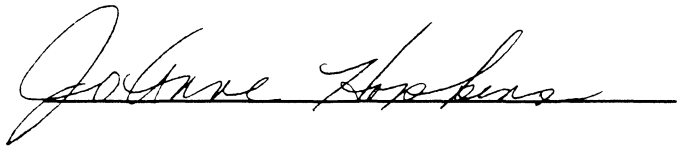
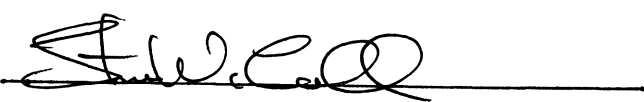
My commission expires:



CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Ray, Quinney & Nebeker, 79 South Main, Suite 500, Salt Lake City, Utah, and that in said capacity, two true and correct copies of the foregoing Respondent's Petition for Rehearing were mailed by United States Mail, postage prepaid, this 26th day of October, 1995, to:

Keith W. Meade, Esq.
COHNE, RAPPAPORT & SEGAL
525 East 100 South, 5th Floor
P. O. Box 11008
Salt Lake City, Utah 84147-0008

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.



GENERAL PROVISIONS (Sections)

INCLUDED ITEMS. Unless excluded herein, this sale shall include all fixtures and any of the following items if presently attached to the property, plumbing, heating, air conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmit fencing, trees and shrubs.

INSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or a production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, inspection shall be allowed by Seller but arranged for and paid by Buyer.

SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not been remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be paid in full current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound and in satisfactory working condition at closing.

CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and the use of the well or wells is authorized by a state permit or other legal water right.

CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the principal rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally agree to the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, the earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. If, after closing, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by a title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and all encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money less Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any title insurance charge.

EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a list of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

if her authority to do so and to bind Buyer to Seller, ^{as a corporation, partnership, trust, estate, or other entity,} ^{person executing} this Agreement on its behalf warrant

COMPLETE AGREEMENT — NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and cancels all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement expressly modified or excluded therein.

DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages and institute suit to enforce any rights of Seller. In the event of default by Seller or if this sale fails to close because of the non-satisfaction of any express condition of contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. 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. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property to closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

TIME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, time is of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and recorded by all parties to the transaction.

CLOSING COSTS. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

REAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excluded herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, or (b) Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

NOTICE. Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of an event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given is automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

BROKERAGE. For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office.

DAYS. For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

FOUR OF A FOUR PAGE FORM

Yes(X) No(O)

EARNEST MONEY RECEIPT

DATE: June 2, 1992

Resigned Buyer BRUCE MANKA a licensed agent acting on own account hereby deposits with Brokerage
EARNEST MONEY, the amount of SIX THOUSAND AND NO/100 * * * * * Dollars (\$ 6,000.00),
of a check, to be deposited upon mutual agreement,
to be deposited in accordance with applicable State Law

RE PROPERTIES 355-5100 Received by Kip Paul
Phone Number

OFFER TO PURCHASE

PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 234 East
South in the City of Salt Lake County of Salt Lake, Utah,
any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in
with Section G Said property is owned by Zeitter, a licensed agent as sellers, and is more particularly described
equal to follow.

APPLICABLE BOXES

IMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____

UNIMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

Included Items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property
Following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title _____
Personal property owned by Seller currently on premises.

Excluded Items. The following items are specifically excluded from this sale None.

CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price
Sewer ☒ connected ☐ well ☐ connected ☐ other ☒ electricity ☒ connected
Sewer tank ☐ connected ☒ irrigation water / secondary system ☒ ingress & egress by private easement
Sanitary system _____ # of shares _____ Company _____ ☒ dedicated road ☒ paved
Sewer water ☒ connected ☒ TV antenna ☐ master antenna ☐ prewired ☒ curb and gutter
Sewer water ☐ connected ☒ natural gas ☒ connected ☐ other rights _____

Survey. A certified survey ☐ shall be furnished at the expense of _____ prior to closing, ☒ shall not be furnished
Buyer Inspection Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical
condition, except None Buyer accepts property "as-is".

CHASE PRICE AND FINANCING The total purchase price for the property is FIVE HUNDRED FIVE THOUSAND AND NO/100 * * *
* * * * * Dollars (\$ 505,000.00) which shall be paid as follows

000.00 which represents the aforementioned EARNEST MONEY DEPOSIT
000.00 representing the approximate balance of CASH DOWN PAYMENT at closing
-0- representing the approximate balance of an existing mortgage trust deed note real estate contract or other encumbrance to be assumed by buyer
which obligation bears interest at _____ % per annum with monthly payments of \$ _____
which include ☐ principal, ☐ interest, ☐ taxes ☐ insurance ☐ condo fees, ☐ other _____
-0- representing the approximate balance of an additional existing mortgage, trust deed note real estate contract or other encumbrances to be
assumed by Buyer which obligation bears interest at _____ % per annum with monthly payments of \$ _____
which include ☐ principal ☐ interest, ☐ taxes ☐ insurance ☐ condo fees ☐ other _____
000.00 representing balance if any, including proceeds from a new mortgage loan or seller financing, to be paid as follows Seller to
carry All Inclusive Trust Deed and Note at 10 1/2%, 25 year amortization, monthly P/I
\$4343.24 Buyer agrees to accept payments of \$3500.00 for the first 24 months.
-0- None Any negative accrual shall increase principal balance.

505,000.00 TOTAL PURCHASE PRICE

Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing Buyer agrees to use best efforts
to and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees
to application within n/a days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing a
best rate not to exceed n/a % If Buyer does not qualify for the assumption and/or financing within n/a days after Seller's acceptance
of this Agreement this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to n/a mortgage loan discount
not to exceed \$ n/a In addition seller agrees to pay \$ n/a to be used for Buyer's other loan costs

1. Transfer of Seller's ownership interest shall be made as set forth in Section S. Seller agrees to furnish good and marketable title to the property, subject to exceptions and exceptions noted herein, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, per my opinion (See Section H).

2. SECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any condominium CC & R's prior to signing this Agreement. 3. VESTING OF TITLE. Title shall vest in Buyer as follows: to be directed by Buyer.

4. ERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: None.

5. to the above and Section C shall be limited to the following: None.

6. SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied at closing: Upon depositing an additional \$3000.00 non-refundable earnest money, Buyer shall be allowed to extend closing an additional 30 days. Buyer to take over responsibility for back taxes amount not to exceed \$6,000.00. Seller agrees to pay a 3% sales commission to Commerce Bank at time of closing. If closing takes place any time after 6/30/92, purchase price ***

7. CLOSING OF SALE. This Agreement shall be closed on or before 6/30, 19 92 at a reasonable location to be designated by Seller or to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with Section R. Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other _____

8. DELIVERY OF POSSESSION. Seller shall deliver possession to Buyer on closing unless extended by written agreement of parties.

9. AGENCY DISCLOSURE. At the signing of this Agreement the listing agent Kip Paul represents (☒) Seller (☐) Buyer, Buyer and Seller confirm that prior to signing this Agreement disclosure of the agency relationship(s) was provided to him/her. (☒) Buyer's initials (☒) Seller's initials.

10. GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN INCORPORATED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

11. AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

Signature	Date	Address	Phone	(SSN/TAX ID)
<u>[Signature]</u>	<u>6/3</u>			
Signature	Date	Address	Phone	(SSN/TAX ID)

12. ACCEPTANCE OF OFFER TO PURCHASE. Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

13. REJECTION OF OFFER. Seller hereby REJECTS the foregoing offer. _____ (Seller's initials)

14. COUNTER OFFER. Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and Buyer shall have until _____ (AM/PM) _____, 19 _____ to accept the terms and conditions below.

15. MODIFICATIONS. down payment to be increased \$5,000.00. In consideration of the reduced down payment, Seller agrees to install new boiler by 9/15/92.

Signature	Date	Time	Address	Phone	(SSN/TAX ID)
<u>[Signature]</u>	<u>6-2-92</u>				
Signature	Date	Time	Address	Phone	(SSN/TAX ID)

16. ACCEPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER.

17. REJECTION OF COUNTER OFFER. Buyer hereby REJECTS the COUNTER OFFER. _____ (Buyer's Initials)

18. COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

Signature	Date	Time	Buyer's Signature	Date	Time

DOCUMENT RECEIPT

19. Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed).

20. I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

21. OF SELLER

SIGNATURE OF BUYER

<u>[Signature]</u>	<u>6-2-92</u>	Date	<u>[Signature]</u>	Date
		Date		Date

22. I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19 _____ by _____ Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by _____

FILED

OCT 12 1995

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Melvin Grossgold and Bruce Manka,)	MEMORANDUM DECISION
)	(Not For Official Publication)
)	
Plaintiffs and Appellants,)	
)	Case No. 950086-CA
v.)	
)	
James C. Ziter,)	F I L E D
)	(October 12, 1995)
Defendant and Appellee.)	

Third District, Salt Lake County
The Honorable Frank G. Noel

Attorneys: Keith W. Meade, Salt Lake City, for Appellants
Ira B. Rubinfeld and Steven W. Call, Salt Lake City,
for Appellee

Before Judges Orme, Bench, and Billings.

BENCH, Judge:

Buyers Grossgold and Manka appeal the trial court's order to dismiss, claiming that the trial court erred when it determined that the term "as-is" typed into a standard Earnest Money Security Agreement released Seller Ziter from express warranties contained in the agreement. We agree.

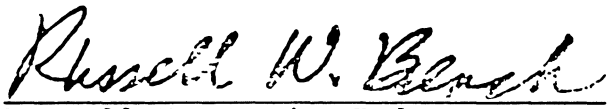
When determining whether a trial court properly granted a rule 12(b)(6) motion to dismiss, we accept the factual allegations in the complaint as true and consider them, and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff. Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990). "The interpretation of a written contract may be a question of law determined by the words in the agreement." LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988). If a trial court interprets a contract as a matter of law, as was the case here, we accord its construction no particular weight and review its actions under a correction-of-error standard. Id.

Paragraph 1(e), when read in isolation, presents the possibility of some internal ambiguity. It provides as follows:


"Buyer Inspection: Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below, accepts it in its present physical condition, except: None. Buyer accepts property 'as-is.'" The trial court determined that the phrase "as-is" in paragraph 1(e) relieved Seller of all express warranties specified under Section C.

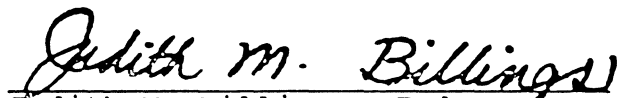
We are required, however, to examine the document in its entirety and in accordance with its purpose, giving effect to all of its parts. LDS Hospital, 765 P.2d at 858; Larrabee v. Royal Dairy Prods. Co., 614 P.2d 160, 163 (Utah 1980). Paragraph 6 provides that "[i]n addition to warranties contained in Section C, the following items are also warranted: None. Exceptions to the above and Section C shall be limited to the following: None." According to the plain meaning of the contract, the parties agreed that there are no exceptions to the express warranties listed in Section C. Accordingly, Section C warranties were not excluded and the trial court erroneously dismissed the case.

Reversed and remanded for further proceedings.


Russell W. Bench, Judge

WE CONCUR:


Gregory K. Orme, Presiding Judge


Judith M. Billings, Judge

COVER SHEET

RAY QUINNEY

OCT 13 1995

& NEBEKER

CASE TITLE:

Melvin Grossgold and Bruce Manka,
Plaintiffs and Appellants,

v.

James C. Ziter,
Defendant and Appellee.

Case No. 950086-CA

October 12, 1995. MEMORANDUM DECISION (Not For Official Publication).

Opinion of the Court by RUSSELL W. BENCH, Judge; GREGORY
K. ORME, Presiding Judge, and JUDITH M. BILLINGS, Judge, concur.

CERTIFICATE OF MAILING

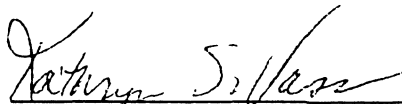
I hereby certify that on the 12th day of October, 1995, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the parties listed below:

Keith W. Meade
Cohne, Rappaport & Segal, P.C.
Attorneys at Law for Appellant
525 East 100 South, Fifth Floor
P.O. Box 11008
Salt Lake City, UT 84147-0008

Ira B. Rubinfeld
Steven W. Call
Ray, Quinney & Nebeker
Attorneys at Law for Appellee
79 South Main Street, Suite 500
Salt Lake City, UT 84145-0385

and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the district court judge listed below:

The Honorable Frank G. Noel
Third District Court
240 East 400 South
Salt Lake City, UT 84111



Judicial Secretary

TRIAL COURT:

Third District, Salt Lake County #930907514 CN