

2006

## Ivan Radman v. Flanders Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IVAN RADMAN, et al., individuals,

Plaintiffs/Appellants,

vs.

FLANDERS CORPORATION, a North  
Carolina corporation.

Defendant/Appellee and Cross-  
Appellants.

FLANDERS CORPORATION, a North  
Carolina corporation. et al.,

Counterclaim and Third-Party Plaintiffs,

vs.

IVAN RADMAN, et al., individuals.

Counterclaim Defendants.

**REPLY BRIEF OF CROSS-  
APPELLANT**

Appellate Case No. 20060479-CA

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah  
The Honorable Joseph C. Fratto, District Court Judge

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## ARGUMENT

### **I. The Radmans Cannot Demonstrate a Plausible Alternative Interpretation of the Language of the Merger Agreement.**

In their opposition to Flanders' cross-appeal, the Radmans allege that Section 9 of the Merger Agreement is open to two plausible interpretations, rendering the agreement ambiguous.<sup>1</sup> The Radmans appear to admit that the alleged ambiguity in the Market Protection Clause is whether "Market Price" means \$1.5 million (as the Radmans claim) or \$8 per share. The contract provision at issue (the "Market Protection Clause") reads as follows:

Pursuant to this Agreement, the GFI Shareholders are receiving 187,502 shares of Flanders Capital Stock as set forth on Exhibit "A" attached hereto. Since the 187,502 shares of Flanders Capital Stock are restricted shares, each share has a discounted market value of **\$8.00 per share**, for an aggregate market price of \$1,500,016 (the "**Market Price**"). If at the time any of the GFI Shareholders sell any of the 187,502 shares of Flanders Capital Stock at a price below \$8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is below \$8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such GFI Shareholders in order to maintain the **Market Price** (the "Short Fall"), with such Short Fall shares valued at the **Market Price**.

[Ex. P-1 (emphasis added).]

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<sup>1</sup> The Radmans also allege that the Agreement is facially unclear. Not only is this allegation entirely inconsistent with their claim that it is open to plausible interpretations, but it is unsupported by their argument, which quite clearly identifies the source of the alleged ambiguity—whether "Market Price" means \$1.5 million or \$8 per share.

Flanders demonstrated in its initial brief that the Market Protection Clause functions and makes sense as a whole only if “Market Price” is defined as \$8 per share.

Under Flanders’ interpretation, the last sentence of the clause reads as follows:

If at the time any of the GFI Shareholders sell any of the 187,502 shares of Flanders Capital Stock at a price below \$8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is below \$8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such GFI Shareholders in order to maintain the [value of \$8.00 per share] (the “Short Fall”), with such Short Fall shares valued at [\$8.00 per share].

The Radmans’ arguments against this interpretation are unpersuasive as they focus solely on whether Flanders’ interpretation would be a good deal for the Radmans, rather than whether the clause works under that interpretation. However, the Radmans signed the Agreement with the language quoted above, and Utah courts “will not make a better contract for the parties than they have made for themselves.” *Bakowski v Mountain States Steel, Inc.*, 2002 UT 62, ¶19, 52 P.3d 1179. Moreover, the Radmans’ arguments are unhelpful, as they ask the Court to pick a side rather than enforce the contract. The Radmans’ “illustration” proves this point. The Radmans point out that, under Flanders’ interpretation, if Flanders’ stock dropped to \$.02 per share, the Radmans would only have received \$7,491.10. Of course, under the Radmans’ “interpretation” this same hypothetical situation would result in Flanders having to issue 74,813,298 additional Short Fall Shares – nearly three times the entire number of outstanding shares of Flanders common stock. Overnight the Radmans would become the 75% owners of this public company. The absurdity of this result highlights the uselessness of the Radmans’

arguments. In reality, Flanders' interpretation of the Market Protection Clause is the only one that is plausible.

This nicely frames the question for the Court—do the Radmans even have a plausible interpretation of the language used in the Market Protection Clause? The answer is no. Under the Radmans' purported interpretation, the last sentence of the clause reads as follows:

If at the time any of the GFI Shareholders sell any of the 187,502 shares of Flanders Capital Stock at a price below \$8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is below \$8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such GFI Shareholders in order to maintain the [value of \$1,500,016] (the "Short Fall"), with such Short Fall shares valued at [\$1,500,016].

The Radmans do not even try to show how the Market Protection Clause could plausibly function under this interpretation, which is what they are required to show in order to establish that the provision was ambiguous. *See Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶¶15-17, 133 P.3d 428 (“to merit consideration as an interpretation that creates an ambiguity, the alternative rendition ‘must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction.’” (emphasis added)). Instead, the Radmans' “plausible” interpretation of the Market Protection Provision makes the clause nonsensical. For example, if only one of the Radmans sold only 100 shares at \$4 per share, which they were entitled to do under the Agreement, that Radman would have received \$400. Under the Radmans' interpretation, that \$400 would be compared to the “Market Value” of \$1,500,016,



yielding a Short Fall of \$1,499,616, even though the Radmans still held 187,402 shares. That Short Fall would then be divided by \$1,500,016, the “Market Value” at which the Short Fall shares were to be valued, resulting in the issuance of .99 shares. Even worse, if all of the Radmans’ shares were sold for nothing, resulting in a \$1,500,016 Short Fall, the Radmans would receive one Short Fall share. Recognizing this absurdity, the Radmans claim that, because it is nonsense under their interpretation, the language of the provision should be ignored and entirely rewritten to suit their purposes. The trial court should not have indulged the Radmans by interpreting ambiguity into the contract just so that it could be judicially rewritten. *See R&R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1079 (Utah 1997). Since the Market Protection Clause has only one plausible interpretation, the one Flanders offered, the trial court erred in holding that it was ambiguous. The ruling in favor of the Radmans on their claim for breach of contract should be reversed.

## **II. The Trial Court’s Interpretation of the Contract Exceeded the Scope of Its Power.**

The Radmans appear to have missed the point of Flanders’ second assignment of error on cross-appeal. Flanders does not dispute the trial court’s factual findings as to the intentions of the parties, which is why no evidence was marshaled to contradict those findings. Flanders’ sole legal issue with respect to the trial court’s interpretation is whether the trial court exceeded its authority by mandating a particular result rather than providing an interpretation of the contract language. Nowhere in its findings does the trial court identify how the language of the Market Protection Clause should be read.

Instead, the trial court completely scrapped the language used and agreed to by the parties, and rewrote a provision with terms and calculations not found in the Contract. This exceeded the trial court's authority, regardless of its factual findings regarding the parties' intentions. *See WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶25, 54 P.3d 1139 ("It is the general rule that if an agreement is ambiguous because of a lack of clarity in the meaning of particular terms, it is subject to parol evidence as to what the parties intended with respect to those terms." (emphasis added)). This is a legal question reviewed for correctness, and no marshalling was required. *See Wade v. Stangl*, 869 P.2d 9, 12 (Utah Ct. App. 1994); *Lysenko v. Sawaya*, 2000 UT 58, ¶17, 7 P.3d 783. Since the trial court exceeding its authority in the way it approached the interpretation of the contract, the trial court's ruling must be reversed.

### **III. The Trial Court Improperly Ruled That the Radmans Were Co-Prevailing Parties**

This court has quite clearly stated that "[t]here can be only one prevailing party in any litigation." *Cache County v. Beus*, 2005 UT App 503, ¶14, 128 P.3d 63. Based on this Court's holding in *Cache County*, the trial court's ruling that both parties prevailed was an error of law that should be remanded to the trial court.

However, the circumstances of this case highlight the need for this Court to provide some guidance on the "flexible and reasoned" approach first used by the Utah Court of Appeals in *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 557 (Utah Ct. App. 1989) and adopted by the Utah Supreme Court in *A.K.&R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, 94 P.3d 270. In particular, this Court should advise the

trial court that the “total victory” and “percentage of amounts claimed” analyses are inappropriate to this case, which involves unspecified consequential damages. The flexible approach begins (and possibly ends) with the “net judgment rule,” pursuant to which the party awarded the most damages is the prevailing party. *See Mountain States*, 783 P.2d at 557. If the “net judgment rule” provides a sensible result, the trial court need not look any further. However, if the trial court is uncertain of the “net judgment rule” result, it can consider other “common sense perspectives” that it finds applicable to the case at issue. *See Whipple*, 2004 UT 47 at ¶26.

The Radmans’ assert that the “flexible and reasoned approach” requires the Court to apply the “total victory” and “percentage of amounts claimed” analyses to this case. Of course, the Utah Supreme Court has not required that, but only held that if the trial court is uncertain of the “net judgment rule” result, it can consider other “common sense perspectives” that it finds applicable to the case at issue. *See Whipple*, 2004 UT 47 at ¶26. *Whipple* did not endorse the “total victory” and “percentage of amounts claimed” analyses in all cases, but merely stated that in the context of *Mountain States* those analyses seemed appropriate. *See id.* However, both the Utah Supreme Court and this Court have acknowledged that many other approaches may be applicable, depending on the facts of the particular case. *See Whipple*, 2004 UT 47 at ¶26; *Carlson Distrib. Co. v. Salt Lake Brewing Co., L.C.*, 2004 UT App 227, ¶37, 95 P.3d 1171.

The “total victory” and “percentage of amounts claimed” analyses relied upon by the Radmans only function, and have only been applied, where the parties seek damages

that are specified in their pleadings. *See Mountain States*, 783 P.2d at 558; *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 219 (Utah Ct. App. 1990). Moreover, the Utah Supreme Court has only applied those analyses where the parties sought direct damages that were specified in the pleadings and relatively liquidated in amount. *See Whipple*, 2004 UT 47 at ¶26 (foreclosure of mechanics lien). The “total victory” and “percentage of amounts claimed” analyses worked in *Mountain States* because this Court was able to boil the dispute down to how a \$30,000 pot of cash should be split between the parties. *See Mountain States*, 783 P.2d at 558. Of course, even in that circumstance, this Court ultimately still decided to use the “net judgment rule.” *See id.* An attempt to apply the “total victory” and “percentage of amounts claimed” analyses in this case shows how inappropriate those analyses are where parties assert claims for unspecified consequential damages.

First, both Flanders and the Radmans sought some direct damages – for Flanders the purchase price of the electric melters and for the Radmans the uncovered ShortFall amount. Note that neither party specified in its pleadings the exact amount of even these direct damages, giving the Court no hard numbers to compare against the ultimate result. If however, we take the amount of direct damages computed by each party’s experts, both Flanders and the Radmans were awarded all of their direct damages in this case.

Second, both Flanders and the Radmans also sought some consequential damages. Flanders sought additional repair costs and lost profits in an undeterminate amount. The Radmans seek to put a \$107 million figure on those damages, based upon affidavits from

Steve Clark as to the damage to Flanders' market capitalization, among other things. However, at trial, Flanders' damages expert only testified as to \$4 million of consequential damages. How much, then, did Flanders actually "seek"? On the other hand, the Radmans initially sought specific performance as an alternative in their Complaint, asking for the actual shares of Flanders stock that they alleged they were entitled to. Since the value of Flanders' stock has steadily climbed since April 19, 1999, this appears to be a claim in the alternative for lost profits from the appreciation of the Flanders stock, a consequential damage. The amount of lost profits the Radmans were "seeking" can only be estimated, but one possible estimate is to take the stipulated damages amount of \$547,904.50, at the closing price on April 19, 1999 of \$2.875 per share of Flanders stock, to determine that the Radmans were asking for 190,575 additional shares of Flanders stock. As of November 1, 2005, the closing (immediately prior to the trial court's hearing on attorneys fees) price of Flanders stock was \$10.91 per share. Under this analysis the Radmans were asking for over \$2 million of Flanders stock, or approximately \$1.5 million in lost profits on the shares they requested. The Radmans did not pursue this claim at trial. Thus, neither party got any of these consequential damages.

Finally, we can add the direct and consequential damages together. Flanders sought somewhere in between \$5 and \$107 million in total damages, and received \$1 million, or somewhere from 20% to 1%. The Radmans sought somewhere in the vicinity of \$2 million in total damage. This analysis is completely unhelpful in this case. The


parties tied on direct damages, recovering 100% each. The parties tied on consequential damages, recovering 0% each. On a combined basis, the Radmans recovered somewhere in the 25% range, while Flanders recovered somewhere in the 20% to 1% range. The trial court is still not provided with any identification of “a clearly successful party that is genuinely entitled to receive attorney fees.” *Whipple*, 2004 UT 47 at ¶26. The version of the “flexible and reasoned” approach championed by the Radmans therefore fails in its purpose of clarifying the identity of the real “prevailing party.” This Court should therefore instruct the trial court to decline to use the Radmans’ approach, and apply the commonly used and easily understood “net judgment rule” in determining the prevailing party on remand.

### CONCLUSION

Because the trial court erred in critical ways in its interpretation of the Market Protection Clause, the judgment rendered in favor of the Radmans on their claims should be reversed, and the trial court’s determination that the Radmans were co-prevailing parties should be reversed.

DATED this 17<sup>th</sup> day of May, 2007.

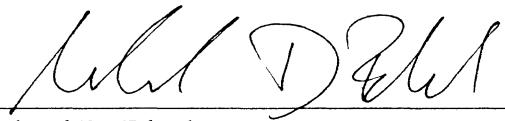
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of May, 2007 two true and correct copies of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** were served via first class U.S. mail, postage prepaid, upon:

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