

1995

John Jay Donohue v. Jean Claude Mouille and Vern E. Krogman : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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UTAH STATE COURT OF APPEALS

JOHN JAY DONOHUE)	
)	
Plaintiff and Appellant,)	Third District Court
)	Civil No. 930905429CV
)	Priority No. 15
)	
vs.)	Appellate Court No.
)	950228 #950517-CA
JEAN CLAUDE MOUILLE; and)	
VERN E. KROGMAN)	Appeal from Judgment
)	in the
Defendants and Appellees.)	Third District Court
)	
)	Honorable Frank G. Noel

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FILED

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JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to Utah Code Annotated §78-2a-3(2)(j).

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFF AND DEFENDANTS ENTERED INTO AN ORAL AGREEMENT TO SELL THE 1986 KENWORTH TRACTOR TO DEFENDANT KROGMAN.

II. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ALLEGED ORAL AGREEMENT WAS NOT BARRED BY UTAH'S STATUTE OF FRAUDS.

III. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE PLAINTIFF'S COMPLAINT.

STATUTES WHOSE INTERPRETATION IS DETERMINATIVE OR SIGNIFICANT

Section 25-5.4. Certain agreements void unless written and signed. The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(2) every promise to answer for the debt, default, or miscarriage of another.

Section 25-5-8. Right to specific performance not affected. Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The finds of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rule 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

STATEMENT OF FACTS

1. On February 15, 1991, prior to the oral agreement between Plaintiff Donohue and Defendant

Krogman, Plaintiff Donohue entered into a written lease agreement with Mr. Mouille, d/b/a U.S. Load Services, for the lease of a 1986 Kenworth Truck. (Appellant's Addendum "D").

2. That lease agreement required Mr. Mouille to pay \$1,000.00 per month to Associates Commercial Corporation directly and to pay Plaintiff Donohue \$500.00 per month. (Appellant's Addendum "D", Paragraph 2).

3. Defendant Krogman was not a party to said Agreement, did not execute said Agreement, and never saw the written Agreement. (Transcript, p. 163; Defendant Krogman's Deposition, p. 21-23) (Appellee's Addendum "A").

4. Mr. Mouille leased the truck from Plaintiff Donohue until December of 1991, when he informed Plaintiff Donohue that he was closing down U.S. Load Services (Transcript, p. 93).

5. In December of 1991, Plaintiff Donohue told Mr. Mouille that he was not in the financial position to pay for the remaining 17-18 months payments on the truck and

that he would consider any option that Mr. Mouille suggested. (Transcript, p. 93).

6. Consequently, Mr. Mouille contacted Defendant Krogman about purchasing Plaintiff Donohue's truck. (Transcript, p. 94).

7. The parties scheduled a meeting between Plaintiff Donohue, Defendant Krogman and Mr. Mouille at Mr. Mouille's parents' house. (Transcript, p. 95).

8. The meeting took place at the very first part of January of 1992. (Transcript, p. 95).

9. The sole purpose of the meeting was to discuss the possibility of Defendant Krogman purchasing Plaintiff Donohue's truck. (Transcript, pp. 95-96).

10. During the meeting, Plaintiff Donohue and Defendant Krogman entered into a verbal agreement, under which, Defendant Krogman agreed to take over the truck as of the 15th of January, and to make all remaining payments on the truck. (Transcript, pp. 96 & 153).¹

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On direct examination, Mr. Mouille testified that during the meeting at his parents' house the following was said and understood by the parties:

11. The parties agreed that once Defendant Krogman paid off the truck, Plaintiff Donohue would give him the title to the truck. (Transcript, p. 104).

12. At the meeting, Plaintiff Donohue never addressed the \$500.00 monthly payment made by Mr. Mouille to Plaintiff Donohue under the 1991 lease agreement. (Transcript, p. 97).²

13. The terms of the contract were as follows: Defendant Krogman would make the remaining \$1,000.00 monthly payments to Associates through Mr. Mouille, who

"Q. (By Mr. Skeen). Tell me, as near as you can recall, who said what.

A. Mr. Krogman was just acknowledging the discussion that John Donohue and we were having in front of Vern. We would have made this verbal, gentlemen's agreement. Consequently, the only function that the deal was, that Vern Krogman was going to take over the truck as of the 15th of January. He would have had to pay a half payment and then every remaining payment." (Transcript, p. 96).

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At trial, Mr. Mouille gave the following testimony:

Q. During that meeting, did Mr. Donohue ever say, well, wait a minute, what about my additional 500 per month you owe me? Ever raise that as an issue?

A. No. Never did." (Transcript, p. 97).

was Plaintiff Krogman's agent. (Transcript, pp. 97 & 154-155).³ Once the final installment was made on the Kenworth, Plaintiff Donohue would turn the title over to Defendant Krogman. (Transcript, p. 156).

14. Defendant Krogman took possession of the truck on January 3, 1992, and ran the truck until December 21, 1992. (Transcript, pp. 156-157).

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Mr. Mouille testified that pursuant to the meeting at his parents' house, the additional terms of the oral agreement between the Plaintiff and Defendant were to be as follows:

"Q. (By Mr. Skeen) Tell me, as near as you can recall, who said what.

A. . . . [T]he only two requests made by John Donohue was that the truck had to be -- remain under my control because John didn't know Vern's address or his residence. And the other request, that I had to make sure the payment was made through my company since deducted out of the settlement was those two conditions were met. That was requirement.

Q. Now, when you say these two conditions and you were to be in control, and payments were to be made through you?

A. Right.

Q. Those were at the request of Donohue, were they not?

A. Yes, sir.

Q. Because Mr. Krogman didn't care who collected the money?

A. Mr. Krogman didn't care, but this was the only requirement, Mr. Krogman agreed to go along with it." (Transcript, pp. 96-97).

15. During the period of purchase, Defendant Krogman made payments on the truck totalling \$17,263.29 together with all repairs, maintenance, licensing, insurance, and all other necessities required by the truck, satisfying the terms of the oral agreement to purchase the 1986 Kenworth truck from Plaintiff Donohue. (Transcript, pp. 153, 156 & 164).

16. Pursuant to the oral agreement between Plaintiff Donohue and Defendant Krogman, Plaintiff Donohue's and Mr. Mouille's attorney, John K. Rice, was contacted about drafting a separate written agreement between Plaintiff Donohue and Defendant Krogman. (Transcript Supplement, p. 4).

17. Attorney Rice drew up a written agreement memorializing the oral agreement between Plaintiff Donohue and Defendant Krogman on March 30, 1992. (Transcript Supplement, p. 7).

18. Prior to drafting the agreement, Mr. Rice spoke to both Mr. Mouille and Defendant Krogman regarding the agreement. (Transcript Supplement, p. 6).

19. Mr. Rice then discussed the agreement with Plaintiff Donohue and that, at that time, Plaintiff Donohue was willing to enter into the agreement. (Transcript Supplement, p. 6).

20. Mr. Rice also drew up a separate agreement between Plaintiff Donohue and Mr. Mouille, d/b/a Haul-A-Way Transport, Inc., under which, Mr. Mouille remained obligated to pay Plaintiff Donohue \$9,500 which he owed under the February 15, 1991, lease agreement. (Transcript Supplement, pp. 5 & 11).

21. Mr. Rice testified that Mr. Mouille agreed to remain solely liable to pay Mr. Donohue the \$500.00 per month and that the \$9,500 debt owed by Mr. Mouille to Mr. Donohue would not affect whether Defendant Krogman would get the title to the truck once he paid off Associates. (Transcript Supplement, p. 5).

22. Contrary to the testimony given by Plaintiff Donohue, Mr. Rice testified that he conversed with Plaintiff Donohue regarding the continued amount owed by Mr. Mouille. (Transcript Supplement, pp. 6 & 11).

23. From January of 1992, until December of 1993, Mr. Mouille withheld \$1,000.00 per month from the monies owed by him to Defendant Krogman and then paid \$1,000.00 directly to Associates pursuant to the installment contract. (Transcript, p. 97).

24. In February, 1993, Defendant Krogman contacted Mr. Mouille and asked for a payoff on the truck. (Transcript, p. 105).

25. Mr. Mouille then called Plaintiff Donohue, requesting the same information. (Transcript, p. 105).

26. Plaintiff Donohue called Associates and reported to Mr. Mouille that the sum of \$5,763.29 was owing on the truck. (Transcript, p. 158).

27. After Mr. Mouille contacted Defendant Krogman and advised him of the payoff figure, Defendant Krogman forwarded a cashier's check to Mr. Mouille, d/b/a Haul-A-Way Transport, Inc., for payment in full of the outstanding balance on the truck. (Transcript, p. 105 & 158).

28. Mr. Mouille did not use the money to pay off the truck at that time but continued to make the

\$1,000.00 monthly payments on the truck during the months of February through June, 1993, from the proceeds of the cashier's check. (Transcript, pp. 105-106).

29. In July, 1993, Mr. Mouille contacted Plaintiff Donohue and told Plaintiff Donohue that he was prepared to make the last payment on the truck to Associates. (Transcript, pp. 106-107).

30. He reminded Plaintiff Donohue that he would need the Kenworth title to transfer to Defendant Krogman. (Transcript, p. 107).

31. Plaintiff Donohue obtained the \$1,065.00 pay-off figure from Associates and called Mr. Mouille, informing him of the pay-off figure. (Transcript, p 107).

32. When Mr. Mouille told Plaintiff Donohue that he had the money to pay off the truck to release the title to Defendant Krogman, Plaintiff Donohue, for the first time, told Mr. Mouille that he would not transfer the title to Defendant Krogman as Mr. Mouille still owed Plaintiff Donohue money. (Transcript, p. 107).

33. Mr. Mouille advised the Plaintiff that the truck was not negotiable and that it belonged to Defendant Krogman. (Transcript, p. 107).

34. Based upon Plaintiff Donohue's representation that he would not tender the title of the truck to Defendant Krogman, Mr. Mouille refused to pay the last installment, in the sum of \$1,065.00, to Associates. Transcript, p. 77).

35. In, or before, September, 1993, Defendant Krogman called Plaintiff Donohue and demanded the title to the truck, pursuant to the contract. (Transcript, p. 159).

36. At that time, Plaintiff Donohue refused to tender the title to Defendant Krogman and demanded return of the Kenworth truck. (Transcript, p. 159).

SUMMARY OF ARGUMENT

The District Court correctly found that an oral agreement existed between the parties to sell the 1986 Kenworth truck to Defendant Krogman. Furthermore, the District Court's four findings of fact regarding the existence of an oral contract are supported by

substantial and competent evidence that a meeting of the minds occurred between the Plaintiff and the Defendant. Moreover, manifestations of assent between the parties, that were in themselves sufficient to conclude a contract, will not prevent the contract's operation simply because the parties also manifested an intent to prepare and adopt a written memorial thereof.

The oral agreement clearly is not barred by Utah's Statute of Frauds. The trial court specifically found that Defendant Krogman performed his part of the agreement in reliance on the parties' agreement. Furthermore, the Record conclusively shows that the oral agreement could have been performed within one year and that Defendant Krogman was not answering a debt for Mr. Mouille or Plaintiff Donohue.

Therefore, the District Court properly dismissed the Plaintiff's Complaint and correctly found that an oral agreement existed between the parties. Appellee respectfully requests that this Court affirm the District Court's judgment for Appellee.

ARGUMENT

- I. THE DISTRICT COURT PROPERLY FOUND THAT THE PLAINTIFF AND THE DEFENDANT ENTERED INTO A BINDING ORAL CONTRACT TO SELL THE 1986 KENWORTH TRUCK TO DEFENDANT KROGMAN.

A. Standard of Review

On appeal, the decision of the trial court is entitled to a presumption of validity. *Oberhansly v. Earl*, 572 P.2d 1384, 1386 (Utah 1977). Utah appellate courts are required to view the evidence and any inferences drawn therefrom in the light most favorable to sustaining the decision. *Id.*; see also *Cutler v. Bowen*, 543 P.2d 1349 (Utah 1975). Furthermore, appellate courts will not overturn a trial court's factual findings when such findings are supported by substantial and competent evidence. *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987).; see also *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Johnson-Bowles v. Division of Securities*, 829 P.2d 101, 107 (Utah App. 1992), cert. denied, 843 P.2d 516, quoting *Idaho State*

Ins. Fund v. Hunnicutt, 110 Idaho 257, 715 P.2d 927, 930 (1985). The burden on an appellant in challenging the trial court's factual findings is heavy. *Cambelt Int'l Corp.*, 745 P.2d at 1242. Thus, findings of fact, whether based upon oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ur R. Civ. P. 52(a).

Therefore, in reviewing the evidence presented at trial, this Court must view the evidence and any inferences drawn therefrom in the light most favorable to sustain the District Court's decision. The District Court heard substantial and competent evidence that clearly supported its factual findings and legal conclusion that a contract existed between the Plaintiff

and the Defendant.⁴ The District Court's decision therefore must be affirmed unless clearly erroneous.

**B. Trial Court's Opportunity to Judge the
Credibility of Witnesses**

It is a function of the judge, as the trier of fact, upon hearing oral testimony, to decide which evidence is more credible regarding the issues at trial. *Lemon v. Coates*, 735 P.2d 58, 60 (Utah 1987). Moreover, a trial court's findings of the ultimate facts implicitly reflect consideration of the believability of the witnesses' testimony. *McKinstry v. McKinstry*, 628 P.2d 1286 (Utah 1981). Appellate courts may not disturb the trial judge's findings unless clearly erroneous. *Lemon*, 735 P.2d at 60.

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Plaintiff's bald assertion that the District Court's factual finding of the existence of an oral contract between the Plaintiff and the Defendant is contrary to the evidence presented at trial. Whether a contract exists between parties is a question of law reviewed for correctness, *John Deere Co. v. A & H Equipment, Inc.*, 876 P.2d 880, 883 (Utah App. 1994). The District Court's factual findings that an oral contract existed were based on the clear and definite testimony of Mr. Mouille, the Defendant, and Mr. Rice. Thus, the District Court's factual findings cannot be overturned unless clearly erroneous.

The trial court judge heard testimony from numerous witnesses and had the opportunity to judge the credibility of the witnesses. Both Mr. Mouille and Defendant Krogman gave clear, unequivocal, and definite testimony of the existence of an oral agreement between the Plaintiff and the Defendant for the purchase of the 1986 Kenworth truck. Moreover, Mr. Rice's testimony confirmed that Plaintiff Donohue understood the terms of the contract and assented to the terms.

Appellant tenuously argues that Defendant Krogman's testimony was impeached because he failed remember the exact date, place, and time of the oral agreement.⁵ This argument is merely an attempt to muddle the clearly

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The evidence presented to the District Court clearly showed that an oral agreement between the Plaintiff and the Defendant arose at the meeting at Mr. Mouille's parents' house. Although several more conversations between the Plaintiff, the Defendant, and Mr. Mouille occurred at the offices of Mr. Mouille's corporation, Haul-A-Way Transport, Inc., in Bountiful, Utah, (Transcript, p. 98), both the Defendant and Mr. Mouille maintained that the parties entered into the oral agreement at Mr. Mouille's parents' house. At subsequent meetings, the Defendant inspected the truck, he and the Plaintiff talked about the different aspects of the truck, and the parties discussed the agreement even further. (Transcript, p. 98).

established facts. Defendant Krogman testified that he and the Plaintiff discussed the terms of the contract, including the purchase price of the truck. (Transcript, p. 156)⁶. Defendant Krogman further testified that both parties understood the terms of the contract and that both parties assented to those terms. (Transcript, pp. 155-156). Both Mr. Mouille and Mr. Rice corroborated Defendant Krogman's testimony regarding the existence of the oral agreement and its terms.

The District Court Judge, as the trier of fact, heard testimony and decided which evidence was more credible regarding the issues at trial. Furthermore, the District Court's findings of the ultimate facts implicitly reflected consideration of the believability of the witnesses' testimony. Thus, this Court should not

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Defendant's testimony is consistent with the District Court's Finding of Facts: "7. The Court finds that while some of the specifics of the contract may not have been discussed in detail between the parties, sufficient terms were discussed and agreed upon to constitute a contract between the parties." (Record, pp. 172-173).

disturb the trial judge's findings unless clearly erroneous.

C. Clear Meeting of the Minds

The District Court's four findings of fact regarding the existence of an oral contract are supported by substantial and competent evidence that a meeting of the minds occurred between the Plaintiff and the Defendant. It is a basic principle of contract law that there can be no contract without a meeting of the minds of the parties which must be spelled out either expressly or impliedly with sufficient definiteness to allow enforcement. *Oberhansly*, 572 P.2d at 1386.

An "oral contract and its terms must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony." *Holmgren Brothers, Inc. v. Ballard*, 534 P.2d 611, 614 (Utah 1975). Moreover, "contractual mutual assent requires assent by all the parties to the same thing in the same sense so that their minds meet as to all the terms." *John Deere Co., v. A & H Equipment, Inc.*, 876 P.2d 880, 884 (Utah

App. 1994), quoting *Crismon v. Western Co. of North America*, 742 P.2d 1219 (Utah App. 1987).

Here, the Record clearly establishes that the terms of the oral contract between the Plaintiff and the Defendant were clear, definite, and mutually understood. The Defendant, Mr. Mouille, and Mr. Rice gave clear, unequivocal, and definite testimony regarding the terms of the oral agreement and the parties' mutual understanding of said agreement.

As mentioned above, Mr. Mouille testified that he leased the truck from the Plaintiff until December of 1991, when he informed the Plaintiff that he was closing down his business on December 15, 1991. (Transcript, p. 93). Mr. Mouille then testified that Plaintiff Donohue told him that he could not afford to pay the remaining 17-18 months payments on the truck, and therefore, Mr. Mouille approached Defendant Krogman about purchasing the truck from Plaintiff Donohue. (Transcript, pp. 93-94).

Mr. Mouille testified that a meeting, between John Donohue, Vern Krogman and himself, took place at the very first part of January of 1992 at his parents' house.

(Transcript, p. 95). Mr. Mouille further testified that the sole purpose of the meeting was to discuss the purchase of the truck (Transcript, pp. 95-96).

On direct examination, Mr. Mouille testified that during the meeting at his parents' house, both the Plaintiff and the Defendant understood that the Defendant was going to take the truck and begin payments to Associates as of the 15th of January. (Transcript, p. 96). Mr. Mouille testified that, at Plaintiff Donohue's request, the additional terms of the oral agreement were that the truck had to remain under Mr. Mouille's control and that Defendant Krogman had to make every remaining payment through Mr. Mouille's company. (Transcript, pp. 96-97). Mr. Mouille testified that Defendant Krogman agreed to the terms proposed by Plaintiff Donohue. (Transcript, p. 97).

Defendant Krogman testified that, under the oral agreement, Plaintiff Donohue required him to pay \$1,000.00 per month to Associates through Mr. Mouille until the truck was paid off. (Transcript, p. 154). Defendant Krogman also testified that the parties

understood that after he had made all of the payments through Mr. Mouille to Associates, that Plaintiff Donohue would give him the title to the truck. (Transcript, p. 155).

Furthermore, John Rice, Plaintiff Donohue's attorney, testified that, pursuant to the oral agreement between Plaintiff Donohue and Defendant Krogman, he was contacted about drafting a separate written document, memorializing the oral agreement between Plaintiff Donohue and Defendant Krogman. (Transcript Supplement, p. 4). Mr. Rice also testified that he drew up a written agreement memorializing the oral agreement on March 30, 1992. (Transcript Supplement, p. 7).

Mr. Rice then testified that he spoke to both Mr. Mouille and Defendant Krogman regarding the agreement between the Plaintiff and the Defendant. (Transcript Supplement, p. 6). Mr. Rice further testified that he discussed the agreement with Plaintiff Donohue and that Plaintiff Donohue was willing to enter into the agreement. (Transcript Supplement, p. 6). Mr. Rice concluded his testimony by confirming that Plaintiff

Donohue had conversed with Mr. Mouille regarding the \$9,500 debt and that the parties agreed that Mr. Mouille was to pay the \$9,500. (Transcript Supplement, pp. 5, 7 & 11).

It is interesting to note that Mr. Rice drew up an entirely separate agreement between the Plaintiff and Mr. Mouille, under which, Mr. Mouille remained obligated to pay the Plaintiff \$9,500 which he owed the Plaintiff under the February 15, 1991, lease agreement between the Plaintiff and Mr. Mouille. (Transcript Supplement, p. 5). The fact that Mr. Rice was asked to prepare two separate documents is substantial and competent evidence that Plaintiff Donohue intended to enter into, and, in fact, had already entered into two separate agreements with Mr. Mouille and Defendant Krogman.

Appellant argues that he had no input in drafting these documents and that the terms and conditions were supplied only by Mr. Mouille. This contention is without merit. As mentioned above, Mr. Rice testified that Plaintiff Donohue conversed with Mr. Mouille about the written agreement between Plaintiff Donohue and Defendant

Krogman and that he was willing to enter into said agreement. (Transcript Supplement, p. 7). Furthermore, Mr. Rice testified that he conversed with the Plaintiff regarding the new agreement between the Plaintiff and Mr. Mouille. (Transcript Supplement, p. 11). Finally, the Plaintiff informed Mr. Rice that, pursuant to the new agreement, Mr. Mouille would remain separately liable for the \$9,500 resulting from the 1991 lease. (Transcript Supplement, p. 11).

The District Court therefore properly found that an oral agreement existed between the Plaintiff and the Defendant for the purchase of the Kenworth truck. There was a clear meeting of the minds between the parties which was expressly understood with sufficient definiteness to require enforcement of the oral agreement. All parties knew that Defendant Krogman was to pay the remaining payments to Associates through Mr. Mouille and receive title to the truck when the payments were made. The parties also knew that Mr. Mouille was to separately pay Plaintiff Donohue \$9,500. Furthermore, the oral contract and its terms were clear, definite,

mutually understood, and established by clear, unequivocal and definite testimony. Finally, the parties to the contract mutually assented to the same thing in the same sense so that their minds met as to all the terms.

D. Sufficient Manifestations of Assent

Appellant argues that the parties merely negotiated at the meeting at Mr. Mouille's parents' house because the Plaintiff did not manifest a willingness to contract until the agreement was reduced to writing. The Supreme Court of Utah has recognized that "[m]anifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof." *Sackler v. Savin*, 267 U.A.R. 22, 24 (Utah 1995), (citing RESTATEMENT (SECOND) OF CONTRACTS §27 (1981)). The District Court's factual findings are consistent with the testimony given by Defendant Krogman, Mr. Mouille, and Mr. Rice that both Plaintiff Donohue and Defendant Krogman manifested assent

to contract regarding the sale of the Kenworth truck at the meeting at Mr. Mouille's parents' house.

Plaintiff Donohue's assent was clearly manifested by: (1) allowing Defendant Krogman to drive the Kenworth truck for 16 months; (2) pursuant to Defendant Krogman's request, Plaintiff Donohue called Associates for the pay-off amount on the truck; (3) Plaintiff Donohue made no payments to Associates during the term of the contract between Plaintiff Donohue and Defendant Krogman; (4) Plaintiff Donohue did not pay any insurance, licensing fees, taxes, or maintenance on the truck during the period of the contract; (5) If no agreement existed, why didn't Plaintiff Donohue demand return of the truck at the outset?; (6) Finally, why didn't Plaintiff Donohue sue Mr. Mouille when Mr. Mouille stopped making the \$1,500 per month payments due under the original agreement if no contract with Defendant Krogman existed? Plaintiff Donohue sat on his rights, allowing Defendant Krogman to make all payments to Associates, and then, only when Defendant Krogman fully performed his part of

the agreement, did Plaintiff Donohue disavow the contract.

Appellant next argues that there must be a clear meeting of the minds before either a modification or novation of an existing contract occurs. See *Provo City Corp., v. Nielson Scott Co.*, 603 P.2d 803 (Utah 1979). Appellant fails to recognize the existence of two separate contracts; one between the Plaintiff and Mr. Mouille, and one between the Plaintiff and Defendant Krogman. While there must be a meeting of the minds to modify an existing contract between the original contracting parties, the modification does not affect an entirely separate contract between one of the parties and a third party.

In the present case, the contract between Plaintiff Donohue and Defendant Krogman was never modified, requiring a new meeting of the minds. Assuming, arguendo, as appellant contends, that the original agreement between Plaintiff Donohue and Mr. Mouille was never cancelled. It was clearly modified by the parties' conduct. Although not modified in writing, the original

agreement would still be enforceable outside of Utah's Statute of Frauds due to the doctrine of partial performance as discussed below.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE ORAL AGREEMENT WAS NOT BARRED BY UTAH'S STATUTE OF FRAUDS.

A. Standard of Review

Factual Findings are upheld unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Zions First Nat. Bank v. Nat. Am. Title Ins.*, 749 P.2d 651, 653 (Utah 1988). Whether a contract exists between parties is a question of law reviewed for correctness. *John Deere Co.*, 876 P.2d at 883.

B. Statute of Frauds

Utah's Statute of Frauds, § 25-5-4 U.C.A. (1953), as amended, bars both oral agreements where, by their terms, cannot be performed within one year and oral agreements to answer for the debts of another. (Emphasis added). Notwithstanding Utah's Statute of Frauds, courts enforce oral agreements where one party has performed in reliance on the agreement. *Martin v. Scholl*, 678 P.2d

274, 275 (Utah 1983); see also 73 Am. Jur., *Statute of Frauds*, § 399. Furthermore, § 25-5-8 U.C.A. (1953) of the Utah Statute of Frauds provides: "Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." *Martin*, 678 P.2d at 275, quoting § 25-5-8 U.C.A. (1953).

The Supreme Court of Utah outlined the following standard of sufficient part performance:

First, the oral contract and its terms must be clear and definite; second the acts done in performance on the contract must be equally clear and definite; and third, the acts must be in reliance on the contract. Such acts in reliance must be such that (a) they would not have been performed had the contract not existed, and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate. Reliance may be made in innumerable ways, all of which could refer exclusively to the contract.

Id., at 275, citing *Randall v. Tracy Collins & Trust Co.*, 6 Utah 2d 18, 23, 305 P.2d 480, 483 (Utah 1956); see also 2 Corbin on Contracts, § 425 (1950) (performance must be in pursuance of the contract and in reasonable

reliance thereon); 37 C.J.S., *Statute of Frauds*, § 250 (1943) (part performance to be sufficient to take the case out of the statute must consist of clear and definite acts of the party relying thereon).

As mentioned above, § 25-5-8 U.C.A. (1953), provides that part performance may remove a contract from the bar of the statute of frauds. *Young v. Moore*, 663 P.2d 78, 80 (Utah 1983). "The doctrine of part performance in this State has not been confined to a fixed, inflexible formula." *Id.* In *Holmgren Brothers*, *supra.*, the Court stated:

The doctrine of part performance, in the State of Utah, has not been reduced to a formula . . . Thus, decisions of this court do not stay the hand of equity in the equitable situations created by oral contracts for the transfer of an interest in land, but the statute is preserved and remains to serve its purpose -- the prevention of fraud and injustice.

Id. at 613-14. Furthermore, the statute of frauds has no application to fully executed contracts, and matters arising out of fully executed contracts may be enforced. *Kerr v. Hillyard*, 51 Utah 364, 170 P. 981 (1918); *Greenwood v. Jackson*, 102 Utah 161, 128 P.2d 282 (1942).

In the present case, Plaintiff Donohue and Defendant Krogman entered into an oral agreement whereby Defendant Krogman would purchase a 1986 Kenworth truck from Plaintiff Donohue. While this agreement involved the sale of goods and not realty, it was clearly taken out of Utah's Statute of Frauds based on the doctrines of part performance and fully executed contracts. Under the terms of the oral agreement, Defendant Krogman was required to make payments on the truck totalling \$17,263.29 together with all repairs, maintenance, licensing, insurance, and all other necessities required by the truck. (Transcript, pp. 156 & 164).

Defendant Krogman made all payments, as specified by the Plaintiff Donohue, to Mr. Mouille, Plaintiff Donohue's agent. (Transcript, pp. 97, 154, 156, & 164). In February of 1993, Defendant Krogman paid the pay-off total of \$5,763.29 to Mr. Mouille, Plaintiff Donohue's agent. (Transcript, p. 158). Although Mr. Mouille failed to forward that amount to Associates at that time, he continued to make monthly payments to Associates. (Transcript, pp. 105-106). In July, 1993, Mr. Mouille

told Plaintiff Donohue that he was prepared to make the last payment on the truck to Associates so that the title could be released to Defendant Krogman. (Transcript, pp. 106-107). At this point, for the first time, Plaintiff Donohue told Mr. Mouille that he would not honor the contract nor transfer the title to Defendant Krogman. (Transcript, pp. 106-107).

Defendant Krogman fully performed his duties under the oral agreement, and therefore, Utah's Statute of Frauds has no application to this fully executed contract. Even if this Court finds that the oral contract between the Plaintiff and the Defendant was not fully performed, it must find that Defendant Krogman's partial performance effectively took the agreement outside Utah's Statute of Frauds.

First, the oral contract and its terms were clear and definite; second, the acts done by the parties in performance on the contract were equally clear and definite; and third, the acts by Defendant Krogman were done in reliance on the contract. Defendant Krogman's acts in reliance were such that they would not have been

performed had the contract not existed, and the failure of Plaintiff Donohue to perform would result in fraud on Defendant Krogman, who relied exclusively on the existence of the oral contract. Furthermore, under the Utah Statute of Frauds, § 25-5-8 U.C.A. (1953), this Court has the power to compel the specific performance of the oral agreement between the Plaintiff and the Defendant due to Defendant Krogman's part performance.

Appellant argues that the oral agreement between the Plaintiff and the Defendant should constitute a promise to answer for the debt of another because the District Court found that Defendant Krogman would be responsible for making Mr. Mouille's payments to Associates. This assertion is wholly inconsistent with the District Court's Findings of Fact which state: "1. Commencing December, 1991 through January and February of 1992, Plaintiff and Defendants Krogman and Mouille entered into an oral agreement whereby Defendant Krogman agreed to pay \$1,000.00 per month to Associates which represents the amount owing Associates by Plaintiff for purchase of the Kenworth. (Record, pp. 172-173).

Neither the Record nor the evidence presented at trial suggest that the Defendant contracted to serve as a surety for Mr. Mouille. In fact, the testimony confirms that the Plaintiff sought a buyer for his Kenworth truck. Thus, Plaintiff Donohue entered into an agreement with Defendant Krogman to make the payments to Associates through Mr. Mouille. Furthermore, the Plaintiff contracted separately with Mr. Mouille for the \$9,500 which Mr. Mouille owed the Plaintiff under an earlier agreement.⁷

Finally, Appellant argues that the agreement between the Plaintiff and the Defendant is barred by Utah's Statute of Frauds because it could not have been performed within one year. Whether an oral agreement can be performed in one year is a question of fact. *M&S Constr. & Engineering Co. v. Clearfield State Bank*, 19

7

The District Court found: "6. The oral contract further provided that Defendant Mouille would remain liable to Plaintiff for \$500.00 a month, during the term of the contract, which represented the amount of the original lease agreement over and above the \$1,000.00 owed monthly to Associates." (Record, p. 172).

Utah 2d 86, 426 P.2d 225 (1967). If an oral agreement might be performed within one year, courts will enforce that agreement outside of Utah's Statute of Frauds. *Johnson v. Johnson*, 31 Utah 408; 88 P. 230 (1906); *Zion's Serv. Corp. v. Danielson*, 12 Utah 2d 369, 366 P.2d 982 (1961); *Thompson v. Whitney*, 20 Utah 1, 57 P. 429 (1910).

Appellant argues that the agreement did not contain a pre-payment provision for payments on the truck. It is interesting to note that the agreement also failed to mention anything regarding a pre-payment penalty. Thus, Defendant Krogman could have paid off the truck any time within a year of the contract. Based on the facts of the case, the District Court correctly concluded that Plaintiff's statute of frauds defense is inapplicable in this case. (Record, p. 174).

III. THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFF'S COMPLAINT.

A. Standard of Review

The District Court correctly dismissed the Plaintiff's Complaint because it found that the parties

entered into a valid oral agreement for the sale of the Kenworth truck. As previously mentioned, the decision of the trial court is entitled to a presumption of validity. *Oberhansly*, 572 P.2d at 1386. Appellate courts will not overturn a trial court's factual findings when such findings are supported by substantial and competent evidence. *Cambelt Int'l Corp.*, 745 P.2d at 1242. Findings of fact shall not be set aside unless clearly erroneous. *Ut R. Civ. P. 52(a)*.

Although the Plaintiff's Amended Complaint sought damages from Defendant Krogman, the District Court found that there was no cause of action with respect to Plaintiff's claims as embodied within Plaintiff's Complaint. (Record, p. 173). The District Court further found that Defendant Krogman was the legal owner of the Kenworth truck and was entitled to the Kenworth title upon payment to the Plaintiff of the sum of \$1,125.00. (Record, pp. 173-174). The District Court's factual findings were based on substantial and competent evidence and cannot be overturned unless clearly erroneous.

B. Proper Dismissal of Plaintiff's Complaint

At trial, Defendant Krogman presented substantial and competent evidence of the existence of an oral agreement between the Plaintiff and the Defendant. The District Court found, based on substantial and conclusive testimonial evidence given by Defendant Krogman, Mr. Mouille, and Mr. Rice, that an oral agreement existed between the parties. As mentioned above, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Johnson-Bowles*, 829 P.2d at 107.

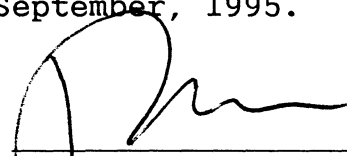
Appellant contends that all reasonable minds would conclude that the Plaintiff is entitled to a judgment against the Defendant as no oral agreement existed between the parties. The District Court properly accepted the Defendant's substantial and relevant evidence as adequate to support a conclusion of the existence of an oral agreement. The District Court, in dismissing the Plaintiff's Complaint, conclusively found that all reasonable minds could not conclude that the Plaintiff proved his case by a preponderance of the evidence. Moreover, the substantial and competent

evidence presented at trial, proved that an oral contract existed between the Plaintiff and the Defendant, under which, Defendant Krogman was rightfully entitled to the 1986 Kenworth truck.

CONCLUSION

The District Court properly found that an enforceable oral agreement existed between the Plaintiff and Defendant. Furthermore, the District Court correctly dismissed the Plaintiff's Complaint based on the substantial and competent evidence presented at trial. The Appellee respectfully requests this Court to affirm the District Court's finding that an oral agreement existed between the Plaintiff and the Defendant. The Appellee respectfully requests his costs on appeal.

DATED this 12th day of September, 1995.



RANDALL L. SKEEN
Attorney for
Defendant-Appellee

CERTIFICATE OF SERVICE

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Randall L. Skeen, being first duly sworn, says:

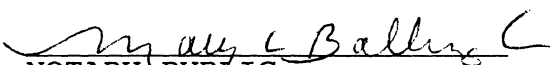
That he is the attorney for Defendant-Appellee herein; and that he served the attached Brief of Appellee upon:

Stephen W. Cook
Stephen W. Cook, P.C.
Attorney for Plaintiff-Appellant
323 South 600 East, Suite 200
Salt Lake City, UT 84102

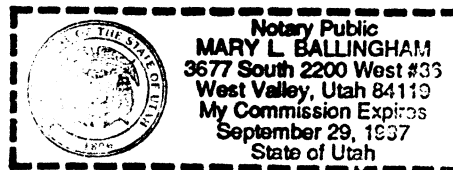


RANDALL L. SKEEN

SUBSCRIBED and SWORN to before me this 13 day
of September, 1995.



NOTARY PUBLIC



ADDENDUM "A"

SALT LAKE COUNTY, STATE OF UTAH

JOHN JAY DONOHUE,)
)
 Plaintiff,) Civil No. 930905429
)
 vs.)
)
 JEAN CLAUDE MOUILLE and)
)
 VERN E. KROGMAN,)
)
 Defendants.)

TAKEN AT: 323 South 6th East, #200
Salt Lake City, Utah

DATE: March 15, 1995

REPORTED BY: Deanna M. Chandler, CSR, RPR

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TOLL FREE (In State) 800-663-7939
FAX (801) 363-8416



1 before?

2 A. No, I'm sure I haven't.

3 Q. To this day? I mean is it your
4 testimony that this is the first time you've ever
5 seen this document, this very minute?

6 A. Yes.

7 Q. Have you ever been informed that a
8 lease agreement existed between Mr. Donohue and
9 Mr. Mouille pertaining to the 1986 Kenworth
10 tractor?

11 A. I didn't know personally there was a
12 written agreement. I knew they had some kind of an
13 agreement. I didn't know whether it was verbal or
14 written.

15 Q. When did you first become aware that
16 there was some kind of an agreement between
17 Mr. Donohue and Mr. Mouille?

18 A. On the Kenworth?

19 Q. Yes, sir.

20 A. Oh, I knew that when I started driving
21 for him. Like I say, when I hired on with U.S.
22 Load Service, John was around there, and there was
23 some talk that this was the guy that owned the
24 truck or was selling it to U.S. Load Service or
25 whatever.

1 Q. Who told you about this agreement?

2 A. I don't know. It might have been
3 either Donohue or Mouille, I'm not sure.

4 Q. Okay. So as early as February of
5 ninety --

6 A. One.

7 Q. One, thank you, you were aware that
8 some form of agreement existed between Mr. Donohue
9 and Mr. Mouille pertaining to the 1986 Kenworth?

10 A. Yes.

11 Q. As I understand your testimony, you
12 started using the 1986 Kenworth in February of '92
13 -- excuse me, January of '92; is that correct?

14 A. Correct.

15 Q. Now, between the time of February of
16 '91 and January of '92, did you ever ask
17 Mr. Donohue or Mr. Mouille for a copy of the
18 agreement?

19 A. No, I never did.

20 Q. Did you know whether or not the
21 agreement was a lease agreement or a sales
22 agreement between Mr. Donohue and Mr. Mouille?

23 A. I assumed it was a sales. I'd heard
24 that mentioned, that John told me he was buying the
25 truck or something. You know, it was really none

1 of my business. I didn't pay much attention.

2 Q. Well, did you do anything to
3 investigation what type of contractual relationship
4 existed between Mr. Donohue and Mr. Mouille
5 pertaining to the Kenworth tractor?

6 A. No, I didn't.

7 Q. I take it there came a point in time
8 when there was some discussion about you taking
9 over the ownership of the Kenworth tractor?

10 A. Correct.

11 Q. Is that correct?

12 A. (Witness nodded)

13 Q. I'd like to find out when was the first
14 occasion that this issue arose at all.

15 A. It would have been after I quit driving
16 for U.S. Load Service in December of '91, between
17 then and January 3rd of '92. Because basically I
18 was out of a job.

19 Q. Did you approach anyone or did someone
20 approach you relative to this Kenworth tractor?

21 A. I was approached.

22 Q. By whom?

23 A. Jean Mouille mentioned it originally,
24 asked me if I might be interested in taking over
25 payments.