

1995

# Joseph W. Shields v. Arvil A. Harris : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 950680- CA

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IN THE UTAH COURT OF APPEALS

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) Case No. 950680-CA  
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BRIEF OF APPELLEE JOSEPH W. SHIELDS

Appeal from the Judgment of the  
Eighth Judicial District Court of  
Duchesne County, State of Utah  
Honorable John R. Anderson

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## ADDENDUMS

1. Letter from Harris to Shields, dated November 5th, 1993.
2. Letter from Harris to Shields' attorney, dated November 12th, 1993.
3. Title Report by Stewart Title.
4. Letter from Shield's attorney to Harris dated August 2, 1993.

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2A-3(2)(k)(Supp. 1995). The district court's Judgment and Decree of Specific Performance were final.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### Issue #1

No tender of Payment was required because:

- (A) Mr. Harris failed to cooperate in following the formula for setting the contract price and announced that he would not accept a sum less than what he insisted upon, regardless of any contract price.
- (B) The property to be sold was encumbered with liens and a set price was indeterminable.
- (C) Mr. Harris refused to recognize legitimate offsets owing to Mr. Shields that reduced the contract price.

### Issue #2

The trial Court acted properly and was correct in:

- (A) Harmonizing the terms of the option to buy the contract and the corresponding lease agreement.
- (B) This issue is not the subject of review on appeal because it was never raised at trial.



## **SUMMARY OF ARGUMENTS**

The appellee, Mr. Joseph Shields, had no duty to tender payment of the purchase price because appellant, Mr. Harris specifically announced that he would not accept the amount of the contract price. Further, the real property to be sold was encumbered with liens and the buyer, Mr. Shields, had legitimate offsets to the purchase price. Therefore the purchase price could not be determined and any tender was pointless.

When viewed in light of the clearly interrelated written agreements, the Option To Buy agreement executed by the seller, Mr. Harris, is consistent and harmonious with the lease agreement. Further, should the court find any inconsistencies between the agreements, they must be construed against the interest of the party who drafted them, and that is the seller, Mr. Harris.

## ARGUMENT

POINT I      NO TENDER OF PAYMENT WAS REQUIRED BECAUSE:  
                 (A) MR. HARRIS FAILED TO COOPERATE IN FOLLOWING THE  
                 FORMULA FOR SETTING THE CONTRACT PRICE AND ANNOUNCED  
                 THAT HE WOULD NOT ACCEPT A SUM LESS THAN WHAT HE  
                 INSISTED UPON, REGARDLESS OF ANY CONTRACT PRICE;  
                 (B) THE PROPERTY TO BE SOLD WAS ENCUMBERED WITH  
                 LIENS AND A SET PRICE WAS INDETERMINABLE; AND,  
                 (C) MR. HARRIS REFUSED TO RECOGNIZE LEGITIMATE  
                 OFFSETS OWING TO MR. SHIELDS THAT REDUCED THE CONTRACT  
                 PRICE.

(A)      MR. HARRIS FAILED TO COOPERATE IN FOLLOWING THE FORMULA FOR  
SETTING THE CONTRACT PRICE AND ANNOUNCED THAT HE WOULD NOT ACCEPT  
A SUM LESS THAN WHAT HE INSISTED UPON, REGARDLESS OF ANY CONTRACT  
PRICE;

The Appellant's Point I argument regarding the requirement for tender of payment fails because in this case it is plain and clear that tender of the purchase price for the subject property required the cooperation of Mr. Harris, (the appellant/seller) and Mr. Harris refused to give that cooperation. A simple reading of the "Option To Buy" contract clause relative to the purchase price makes it obvious that such cooperation is necessary:

A. Lessee, Joseph W. Shields would have this Special option to buy said ranch from Lessor Arvil A. Harris for a reasonable price to be negotiated by five independent people, one man from the Federal land Bank, one man from the Soil Conservation Service in Roosevelt, Utah office, one banker from the First Security Bank of Utah loan department, Roosevelt Utah, one farmer in the Myton, Utah area, and one real estate broker in the Myton or Roosevelt area. These five people would make a fair study at the time of purchase to make an honest and fair appraisal of the ranch. All five bids would be added up for a grand total and divided by five to arrive at a selling price.

(See Appellant's Add. Doc. 1). Under this formula for determining the purchase price of

the subject property, it is impossible to tender an exact payment of cash. There obviously must first be cooperation by the parties in selecting the required five appraisers. Those appraisers must then "make a fair study" of the property and do their due diligence to arrive at their independent appraised value. Only then can the five appraisals be added and divided to obtain the sale price amount.

The trial court recognized the need for such cooperation when it stated in its' Findings of Fact as follows:

Shields was not required to tender the purchase price under the facts and circumstances of this case because the formula for finalizing the purchase price could not be completed without the cooperation of both parties as specifically set forth in the Option To Buy agreement. Since both parties are held to the standard of merchants, good faith and fair dealing is implied in their transactions.

(See Findings of Facts and Conclusions of Law at Appellant's Add. Doc. 4 at 4, ¶ 17).

Mr. Harris, the seller of the land, refused to so cooperate and expressly stated his intent that he would not follow the formula in the Option To Buy agreement. Prior to any legal action having been taken by Mr. Shields (the appellee/buyer), Mr. Harris wrote two letters stating that he would accept nothing less than the price of \$265,000. Those two letters, dated November 5th 1993 and November 12th, 1993, were marked as exhibit #40 and exhibit #41 and received as evidence at trial. (Appellee's Add. Docs. 1 & 2). Relevant portions of exhibit #40 and #41 are quoted here as follows:

"No Judge in the State of Utah would ever make me sell My ranch for less than \$265,000. that's My Price to you, take it or leave it."

"And No Way in Hell will the Judge make me sell the Ranch for less than the \$275,000.00 I told you + I have told Joe - He can have it for \$265,000. take it or leave it. .... I'm - firm in what I want. (\$265,000.00 + Not a penny less)."

While being cross examined on the witness stand, Mr. Harris was asked regarding his willingness to accept tender of payment for anything less than \$265,000. The dialogue went as follows:

Q. (By Mr. Nebeker) Mr. Harris, let me ask this question: If Joe Shields had brought you money for \$190,000, He brought you \$190,000 and tendered payment to you one year ago, would you have accepted it?

A. No, I would not.

Q. And did you communicate that to Mr. Shields?

A. Yes, I did, if there was any communication done. But I would not accept the 190,000. I assume that's the hypothetical figure you put in.

Q. That is a hypothetical figure that I have drawn. Would you have accepted 220,000?

A. No

Q. Would you have accepted a penny less than \$265?

A. No. I was holding out for \$300,000.

Q. And did you communicate that to me as well?

A. I think I did.

(Tr. at pp. 262 -3).

Mr. Harris is refusing to follow the formula of the very Option To Buy agreement that he prepared, executed, and delivered to Mr. Shields. It was Mr. Shields who cooperated by following the formula of the agreement in requesting four of the five appraisers to appraise the

subject property. The fifth appraiser, the Soil Conservation Service, would not engage in such an undertaking. (See Findings of Fact and Conclusions of Law, Appellant's Add. Doc. 4 at 5, ¶¶ 18 & 19). The average of the submitted appraisals was approximately one hundred thousand (\$100,000) dollars less than the \$265,000 that Mr. Harris was insisting upon. Mr. Harris is appealing on the issue of failure to tender payment when he, Mr. Harris, made it plain and clear that any tender of payment which followed the formula of the Option To Buy agreement would be an "idle ceremony" and a "fruitless gesture."

The Utah Court Of Appeals has recently held that tender will be excused where "it is plain and clear that a tender, if made, would be an idle ceremony and of no avail." *Jenkins v. Equipment Center, Inc.*, 869 P.2d 1000, 1003 (Utah App. 1994) citing *Fitzgerald v. Corbett*, 793 P.2d 356, 359 (Utah 1990) (quoting 74 Am.Jur.2d Tender § 4 (1974)); accord *Hansen v. Christensen*, 545 P.2d 1152, 1154 (Utah 1976)(tender excused where obligee's unreasonable conduct "would make an actual tender a fruitless gesture").

The law of the *Jenkins* case respecting tender addresses the same factual situation in the present case and is controlling of the present issue:

Generally, a tender must be made of the amount actually due. See *Simons v. Bushears Transfer and Storage*, 344 P.2d 1107, 112 (Okla. 1959). 'But if the demand of a larger sum is so made that it amounts to an announcement that it is useless to tender a smaller sum, it dispenses with any tender and amounts to a waiver of the lien.'

Id.

In the present case, Mr. Harris demanded a sale price far in excess of the contract formula price and expressly announced that he would not accept "a penny less." Mr. Harris, by written

correspondence and by verbal announcement made it clear that it would be useless to tender any smaller sum. Mr. Shields should not now, as a matter of law, be found at fault for not making a tender. The Appellate Court in Jenkins impliedly adopts the position of other jurisdictions by quoting that "[o]ther states have found tender to be fruitless and thus excused where the lienor states that he or she does not intend to accept payment." Id. (citations omitted).

Appellant cites Carr v. Enoch Smith Co., 781 P.2d 1292 (Utah Ct. App. 1989) to support the opposing argument that tender must be made. But the Carr case explicitly recognizes the very exception that is applicable to the present case:

[t]he familiar rule that the law does not require one to do a vain or useless thing excuses the making of a formal tender which would otherwise be required, where it is reasonably plain and clear that if made, such a tender would be an idle ceremony and of no avail, as where it appears that a tender, if made, will be refused for some reason unrelated to the tender or its sufficiency....

Id. at 1295 (Emphasis added). The law does not require Shields to make a tender where Harris has made it clear that anything less than the arbitrary demand by Harris will be refused.

Appellant fails to address the relevant facts that invoke application of the exception to the tender rule as spelled out in Carr.

Shields took the necessary steps that were required to satisfy any tender requirements.

He got the appraisals as set forth by the formula in the Option to Buy. (Tr. at 108).

He applied for and was approved for a loan from the Federal Land Bank. (Tr. at 109). Evidence of his approved loan is clear by the fact that he actually closed a related loan through Sunrise Title Company in the sum of \$445,000.00. (Tr. at 25 line 10). He obtained a title report and was

ready to close the deal with Mr. Harris at Sunrise Title Company. (Appellee's Add. Doc. 3). He communicated that he was ready, willing and able to perform in connection with the Option contract. Exhibit 38 (Appellee's Add. Doc. 4).

The response by Harris towards these efforts by Shields was communicated in the November 5th and November 12th, 1993 letters referred to previously in this brief. (Appellee's Add. Docs. 1 & 2). The substance of that response was that regardless of the contract formula, "no way in hell" would the property be sold for less than \$265,000.

There is substantial case law outside the state of Utah that supports the exception to requiring offers of tender. The Supreme Court of Washington held that: "[i]t is, of course, true that where a seller announces in advance that he will not complete the transaction the purchaser is excused from making a tender of the money. No one is required to do a vain thing." *Ellingsen v. Landre*, 241 P.2d 207, 209 (1952), (citations omitted). The Colorado Supreme Court upheld the finding that: "...the tender was obviated by the absolute and unqualified refusal of defendant to perform. Tender is not required where it would be an idle or useless thing." *Gerbaz v. Hulsey*, 288 P.2d 357, 360 (1955). The Arizona Supreme Court has ruled similarly:

It is clear from the evidence that defendant did not intend to recognize the contract as one for the purchase of the property and the court was fully justified in concluding that any kind of tender which would require the conveyance of the property would be an empty gesture and useless. No tender of performance is necessary under such conditions. It is sufficient if plaintiff is ready, willing and offers to perform.

*Lee v. Nichols*, 301 P.2d 1022, 1025 (1956).

The unwillingness by Harris to cooperate in following the formula for determining the contract price destines the failure of his case. The Utah Supreme Court in Ferris v. Jennings, 595 P.2d 857 (1979), stated as follows:

But to be considered therewith the parties to a contract are obliged to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent. A contract is not fatally defective as to price if there is an agreement as to some formula or method for fixing it. Quite beyond this, one party to a contract cannot by wilful act or omission make it impossible or difficult for the other to perform and then invoke the other's non-performance as a defense.

Id., at 859 (Emphasis added).

The expressed intent of the Option To Buy contract in the present case is that the average of five appraisals will determine the sale price. Harris was legally obligated to follow the expressed intent of his own contract, but he adamantly refused to do so. Harris can not now claim as a defense to his refusal to abide by the terms of the contract that Shields did not tender what Harris refused to accept.

The parties to a contract are required to act in good faith and are bound to cooperate to carry out their original intent. The Utah Supreme Court has stated:

When parties have entered into a formal contract, such as for the purchase of real property, it is to be assumed that they will cooperate with each other in good faith for its performance, and one refusing to so perform, or claiming a forfeiture thereof, has the burden of showing justification for doing so.

Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980).

Harris had an obligation to act in good faith in accordance with the terms of the contract. Harris was prohibited from making it difficult or impossible for Shields to perform pursuant to



the contract terms and then use this as a defense to Shields' action to enforce the contract. Harris failed to act in good faith. He made it useless and burdensome and perhaps even impossible for Shields to perform tender. As the Court in Tanner stated:

We have no doubt as to the correctness of Defendant's assertion that in order to warrant specific performance, the essential terms of the contract must be sufficiently definite to enable the parties to understand what their obligations are. But the proper application of that rule is as a shield to protect from injustice, and not as a weapon with which to work an injustice.

Id., at 347.

In the case at hand the trial court found that the "[t]erms of the option agreement were definite and enforceable and are construed against Harris who drafted the document." (Findings of Fact & Conclusions of Law at 4, ¶ 13; Appellant's Add., Doc. 4.) Harris now seeks to use his own bad faith as a weapon against his purchaser. Shields should be protected and allowed the exception from tendering any offer and the trial court's ruling should be upheld.

(B) THE PROPERTY TO BE SOLD WAS ENCUMBERED WITH LIENS AND A SET PRICE WAS INDETERMINABLE;

The argument of Appellant respecting tender should fail for another very important reason which Appellant fails to even raise in their brief. Prior to and during trial, the title to the subject real property was encumbered with liens. Mr. Morgan Glines, a professional state certified abstractor for twenty years and a licensed title examiner for Sunrise Title Company in Roosevelt, Utah, was the first witness called at trial. (Tr. at 8). Through Mr. Glines, a documented "Commitment For Title Insurance" was issued to Mr. Shields and that document

was received into evidence at trial. (Appellee's Add., Doc. 3). Based on the afore-stated document and his work regarding the legal status of the title to the subject property, Mr. Glines testified repeatedly that liens and encumbrances existed on the subject property. The relevant portion of Mr. Glines testimony concerning the liens and encumbrances begins on page 12, line 15 of the Trial transcript and runs through page 18, line 8. Mr. Glines testimony refers to seven (7) different liens and his testimony is condensed here as follows:

Lien #1 page 12 line 15:

A. (By Mr. Glines) Item Number 12 appears as a result of a break in the chain of title from rental failure.

Lien #2 page 13 line 13:

Q. (By Mr. Nebeker) Now, what is the next encumbrance that you see from your title report?

A. Eastern easement. I would move down to item 14, which shows a mortgage by James and Carol Rice to Farm Home.

Q. Does your title report reflect the amount?

A. \$32,100.

Q. Is there anything of public record to show that mortgage has been paid or resolved?

A. No.

Q. Is it true then, that before you could insure this title that mortgage would have to be removed?

A. Yes.

Lien #3 page 13 line 25:

Q. What is the next encumbrance that you have?

A. Item Number 15.

Q. Which is?

A. Unrecorded real estate contract between Arvil Harris and Rich Tran.

page 14 line 9 Q. What would it take to clear that encumbrance from the title, do you know?

A. Documentation from Frontier Investments to indicate they do not claim any interest in the title.

Lien #4 page 14 line 16

Q. Is there another encumbrance in your report?

A. Item number 16.

Q. What is that?

A. Another unrecorded real estate contract between Virginia Felter and Marion Felter and Elizabeth Felter where they sold on contract to Rich Tran again.

page 15 line 6

Q. Do you know whether or not Frontier Investments is willing to just give that kind of documentation to clear this lien?

A. No.

Q. Is it possible that they might just give a release?

A. Yes.

Q. Is it possible that you might need to bring a quiet title action to remove their interest or define their interest?

A. Yes.

Q. Do you know what it would take to remove those -- that lien?

A. No.

Q. Isn't it true that it would depend on a number of factors --

A. Yes.

Lien #5 and Lien #6 page 15 line 25

Q. Are there other liens?

A. Yes. Item number 17. It's what we refer to as a long-term lien agreement with the department of Agriculture, the ASCS office where funds have been made available to Arvil Harris for some type of irrigation type system.

Q. Is that the same as item number 18, another agriculture stabilization conservation service loan?

A. It's the same type of thing. But it indicates that it is a different loan. It was recorded at different times. So it would indicate that there are two loans that's been granted by the ASCS office.

Q. And do those two loans currently constitute an encumbrance on the property?

A. Yes, they do.

Q. And until you can insure against those loans, what do you have to receive from the United States department of Agriculture?

A. One of two things: Either a release or an agreement from a person who would be buying the place that would agree to assume those obligations.

Q. Do you know if these are loans that have to be paid back?

A. The loans are typically ones that do not have to be repaid, providing the borrower maintains the property and irrigation equipment and so on in operating condition for a given period of time. At that point, then the debt is normally extinguished.

Q. Do you know what that given period of time is?

A. No, I don't.

Q. And, here again, it may be very easy to go to the department of agriculture and get releases, or it may be very difficult depending on their inspection of the property; is that correct?

A. Yes. That's the determination that the ASCS has to make. And that's it.

Lien #7 page 17 line 10

Q. Are there other liens?

A. Yes. Item 19.

Q. What is that?

A. Same thing that we have been talking about. Same type of an obligation. but it's what we call a wild trust deed mortgage or lien agreement in this case.

Q. And so I would ask what you mean by the word "Wild"?

A. It's a loan that was made to Nelson Farms through the ASCS office. And at the time the loan was made, Nelson Farms did not have a recorded interest in the property nor have they since acquired any.

In view of these encumbrances, which include a break in the chain of title, a mortgage, real estate contract interests, and government loans, it was impossible for Joe Shields to determine an amount that could and should be tendered to Mr. Harris as the purchase price. Accordingly, Mr. Shields did the next best and most proper thing. He employed legal counsel and Sunrise Title Company to perform a closing. Mr. Harris refused the contract price. He arbitrarily demanded more. So the case went to trial.

But even after the completion of all the evidence at trial it was impossible to determine what amount should be tendered to Mr. Harris because of the seven liens. Accordingly, the trial

court entered Findings of Fact paragraph 21 and Conclusions of Law paragraphs 5 and 6, which require offsets to the sale price at such time as the cost of removing the liens and encumbrances do in fact become known. These paragraphs are repeated here for quick reference:

21. There exists some liens and encumbrances on the title to the leased property which will be removed at the expense of Harris or in the alternative, deducted from the purchase price at the time of closing.

5. Harris must furnish Shields marketable title to the property at the date of closing.

6. The purchase price to be paid by Shields at closing is the price of \$202,125.00 less all credits and liens. (emphasis added).

All of the arguments and the law cited above (which need not be repeated) respecting why tender of payment should be excused, apply equally again because the title of the real property to be sold in this case was encumbered. Until those encumbrances are resolved, it was and still is impossible to determine a set amount to tender.

(C) MR. HARRIS REFUSED TO RECOGNIZE LEGITIMATE OFFSETS OWING TO MR. SHIELDS THAT REDUCED THE CONTRACT PRICE.

The trial Court found that the Option To Buy contract was an incentive to induce Shields to lease the property: "The 'Option To Buy' granted by Harris to Shields constituted an incentive or a "dangling carrot" to induce Shields to enter into the ten year May 1, 1987, lease with Harris. Shields relied upon the Option To Buy when entering the ten year lease." (Findings of Fact, Appellant's Add., Doc. 4 at 3, ¶ 9).

Paragraph B of the Option To Buy contract provided that \$5,000.00 of each year's lease payment would be credited to the sale price. Mr. Shields was entitled to a seven year credit, or \$35,000.00 reduction off the sale price. Mr. Harris refused to recognize the Option To Buy with this stated credit. He considered it "null and void" and "just a letter." (Tr. at 164 line 15). The requirement for the tender of a purchase price must be excused when one party refuses to recognize the enforceability of lawful credits applicable to the sale price under the contract.

On the basis of any one of the four reasons outlined in POINT 1 of this brief, and summarized as follows, the appellants argument on appeal is without merit:

1. The appellant failed to cooperate in following the formula for setting the contract price;
2. The appellant announced that he would not accept a sum less than what he insisted upon, regardless of any contract price;
3. The property to be sold was encumbered with liens and a set price was indeterminable;
4. The appellant refused to recognize legitimate offsets owing to appellee.

POINT II THE TRIAL COURT ACTED PROPERLY AND WAS CORRECT IN  
A) HARMONIZING THE TERMS OF THE OPTION TO BUY CONTRACT  
AND THE CORRESPONDING LEASE AGREEMENT; AND  
B) THIS ISSUE IS NOT THE SUBJECT OF REVIEW ON APPEAL BECAUSE  
IT WAS NEVER RAISED AT TRIAL.

A) HARMONIZING THE TERMS OF THE OPTION TO BUY CONTRACT AND THE  
CORRESPONDING LEASE AGREEMENT.

Two fundamental and undisputed facts lay the foundation for responding to the  
appellant's second issue on appeal. First, Mr. Harris was a sophisticated Salt Lake City  
businessman with twenty (20) years of experience in dealing with contracts. The following  
portion of the testimony of Mr. Harris evidences his level of sophistication:

Q. (By Mr. Nebeker) Mr. Harris, I understand that you are now retired?

A. Right.

Q. What was your occupation prior to being retired?

A. I was a nursing home operator

Q. How many nursing homes did you own and operate?

A. five.

Q. For how long did you do that?

A. 20 Years. 22 Years.

Q. In the business of owning and operating nursing homes, did you frequently enter into  
agreements?

A. Into and agreement such as what, real estate?

Q. Did you have an occasion to negotiate contracts?

A. I had a negotiated contract with every one of the nursing homes that I bought or run.

Q. For 22 years you did that, didn't you?

A. That's right.

(Tr. at 154 line 19).

On the other hand, Mr. Shields, although an expert in cattle ranching, had a high school  
education and left most of the paper work up to his wife who died shortly prior to legal action  
commencing in this case. (Tr. at 97 line 10).

The second critical fact is that Mr. Harris, with his background and expertise in negotiating contracts, was the one who drafted the Option To Buy agreement. (Findings of Fact and Conclusions of Law, Appellant's Add., Doc. 4 at 4, ¶ 13). Mr. Shields relied implicitly upon the Option To Buy contract and would have never entered into a long term, ten year lease, without the Option To Buy. (Tr. at 108 line 19). Understanding that Mr. Harris was skilled in contracts and that he prepared the contract in dispute in this case permits us to properly examine appellant's second appeal point.

The courts are required to interpret provisions of an agreement so as to harmonize them and give effect to all of an agreement's terms and provisions if possible. Hardline Co. Inc. v. Eimco Corp., 266 P.2d 494 (Utah 1954); Vance v. Arnold, 201 P.2d 475 (Utah 1949). In the case of G.G.A., Inc. v. Leventis, 773 P.2d 841, 845 (Utah App. 1989), this court, in reviewing apparently conflicting provisions of an agreement, held:

In interpreting a contract, we determine what the parties intended by examining the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole. [Citation Omitted]. The Cardinal rule is to give effect to the intention of the parties and, if possible, to glean those intentions from the contract itself. [Citations Omitted]. Additionally, a contract should be interpreted so as to harmonize all of the terms and provisions and all of the terms should be given effect if possible.

Id. at 845.

Furthermore, this court has held that, "When agreements are executed `substantially contemporaneously and are clearly interrelated, they must be construed as a whole and harmonized if possible.'" HCA Health Services of Utah v. St. Mark's



Charities 846 P.2d 476, 484 (Utah App. 1993). The trial court in the present case applied this reasoning from HCA Health Services and found and entered Findings of Fact numbered one through thirteen. Appellant's brief ignores Findings of Fact numbered one through twelve and takes number thirteen out of context. But the trial court findings viewed together evidence that the four written contracts between Harris and Shields were "clearly interrelated." Those four contracts, all relating to the same real property, are; (1) the April 1, 1985 five year lease; (2) the February 9, 1987 termination of the five year lease, (3) the February 10, 1987 Option To Buy agreement; and, (4) the May 1, 1987 ten year lease.

Appellant argues that the trial court supplied a term inconsistent with the Option To Buy agreement. This argument can be made only if one views the Option To Buy agreement as standing all alone, with no relation to the other three written contracts. But the four contracts are inseparable and the trial court's Findings of Fact, supported by Mr. Harris's own testimony, affirm their connection. (See Findings of Fact, Appellant's Add., Doc. 4, ¶¶ 1-13).

The so called "inconsistent term" alleged by appellant is that the Option To Buy agreement refers to a seven year lease when in fact at the time of the execution of the Option To Buy agreement there was no seven year lease. It is true that there was never a "seven" year lease, (with emphasis being placed on the numerical number seven). In fact at the time that the Option To Buy agreement was executed by Harris, there was not any lease in existence between the parties. The five year lease had been expressly and mutually terminated one day earlier. The Option To Buy was then given as a "dangling carrot" by Harris to induce Shields to enter into a

longer term lease:

Q. (By Mr. Nebeker) There is no question in your mind, is there, Mr. Harris, that the 5,000 per year payment towards the purchase price was an inducement to get Mr. Shields to buy, right?

A. (Mr. Harris) Yes. That's right. (Tr. at 159 line 6).

So Harris expected or hoped, that immediately upon giving the Option To Buy agreement, Shields would come back and execute a new and longer term lease. When drafting the Option To Buy agreement, Mr. Harris knew that no set term of years for a lease was in place and therefore he referred by way of "example," to a seven year lease. Mr. Harris admits that his reference to seven years was a number that he "just picked out of the air," and was only to serve as "an example" in how he would give Shields credit. (Tr. at 159 line 19).

Shields did come back, on May 1, 1987, with a ten year lease. The "dangling carrot" by Harris was effective in getting Shields to sign a new and long term contract with Harris. The ten year period in the new lease was perfectly acceptable to Harris by his own admission at trial. When asked why Mr. Harris terminated the five year lease, he responded, "Because Mr. Shields wanted something more. He wanted a ten-year lease, and that was okay with me." (Tr. at 156 line 7).

For the next seven years Mr. Shields farmed the land and paid Mr. Harris the lease payments, on time. But when another third party potential purchaser came along and made Mr. Harris an offer to buy the land, Mr. Harris changed his tune and wanted to get out of the contract with Shields:

Q. (By Mr. Nebeker) So isn't it true, Mr. Harris, that another buyer came along with a very favorable offer, and you wanted to do anything possible to make that offer valid and accept it; isn't that right?

A. (By Mr. Harris) Yes, that's right.

Q. Okay. Now, did Mr. Shields make his annual lease payments?

A. Yes, he has.

(Tr. at 169 line 7).

The provisions of the Option To Buy agreement are reasonably interpreted and easily understood when read in light of the pre-existing lease, the termination contract on that pre-existing lease, and the forth coming ten year lease. To construe the Option To Buy contract in the manner suggested by Harris is to work a harsh and cruel injustice on Shields. From the time of receiving the ten year lease, Shields built his life around the option that he had to buy the land. He improved the land consistently. He increased his cattle ranching operations according to his improvements. Mr. Harris asks this court to throw out seven years of hard labor and expense performed by Shields because, in essence, Mr. Harris got offered a better deal and on it's surface, the option refers to a seven year lease when Mr. Harris granted Mr. Shields a ten year lease. The trial court's interpretation of the option gives effect to all terms of the agreement and is in harmony with both the previous agreements and the subsequent ten year lease.

Appellant has also argued that the Option to Buy does not specifically refer to when the option must be exercised. Again, this argument is very specious. Paragraph "A" states that "Lessee, Joseph W. Shields would have this Special option to buy said ranch from Lessor Arvil

A. Harris ..." (Appellant's Add., Doc. 1.) The option was given to Shields as the "lessee." As long as Shields is the lessee, he retains the option. Accordingly, the trial court gave Shields the right to purchase the land at any time during the lease, while Shields was the lessee. To this day Shields remains the lessee and Shields has already exercised that option and is patiently waiting for this court to uphold the ruling of the trial court so that he may obtain title and pay Harris.

The language of the Option To Buy agreement is not inconsistent. But even if one reads it so, any uncertainty must be construed against the party who drafted it. The Utah Supreme Court has stated, "The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement." Sears v. Riemersma, 655 P.2d 1105 at 1107 (Utah 1982). See also Hoffman v. Life Ins. Co. of North America 669 P.2d 410 at 417 (Utah 1983).

The trial court is given considerable latitude in its rulings as to specific performance and the trial court in this instance should be afforded such latitude. The Utah Supreme Court has found that:

Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the court and accordingly, considerable latitude of discretion is allowed in [the trial court's] determination as to whether it shall be granted and what judgment should be entered....

Myers v. Myers, 768 P.2d 976, 979 (Utah App. 1989), Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981). See also LHIW, Inc. v. DeLorean, 753 P.2d 961 (Utah 1988).

The trial court in this case should be afforded that latitude of discretion. Similarly the Carr court, has stated that:

[s]pecific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the court and accordingly, considerable latitude of discretion is allowed in determination as to whether it shall be granted and what judgment should be entered in respect thereto; and ruling thereon should not be upset on appeal unless it clearly appears that he has abused his discretion....

Carr v. Enoch Smith Co., 781 P.2d 1292 (Utah Ct. App. 1989). The Court in Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979), has similarly found that since "...specific performance is an equitable remedy, the trial judge has considerable discretion in determining whether equity and good conscience require that the relief be granted." The trial court has not abused its discretion in this case, but properly gave Shields an Order and Decree for specific performance. That ruling should be upheld.

**B. APPELLANT SHOULD NOT BE PERMITTED TO RAISE NEW ISSUES ON APPEAL.**

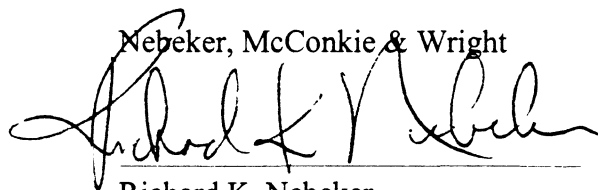
Finally, the Appellant should not be permitted to raise new issues on appeal. The issues raised in Point II of appellant's brief are raised for the first time on appeal. These are issues which appellant failed to put before the court at trial. There is no argument in the record as to when the option had to be exercised. There is no argument in the record that some lease other than the ten year lease related to the option. There was no need for the court to clarify which lease it was referring, because only one lease existed, the ten (10) year lease. Harris never attempted to offer evidence at trial that there was only a seven year option on the ten year lease. Therefore, Harris should be barred from raising such issues now.

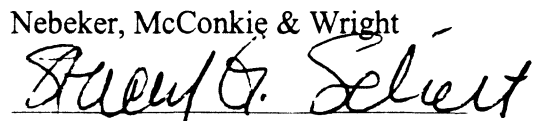
Raising new factual issues on appeal, not addressed at the trial court, is a point that is well grounded in case law and has been ruled on by this court and the Supreme Court of Utah on

many occasions. The Supreme Court in Rocky Mt. Thrift v. Salt Lake City Corp., 887 P.2d 848, 850 (Utah 1994) states that "...issues were not raised before the trial court and may not now be raised." See State v. Smith, 866 P.2d 532, 533 (Utah 1993); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). The Supreme Court again addresses this issue in Stewart v. Utah Public Service Commission, 885 P.2d 759, 781 (Utah 1994). "The general rule is that an issue may not be presented to an appellate court that was not first presented to a lower tribunal." Id. Shields respectfully requests that Point II of the Harris brief be stricken.

#### CONCLUSION

For the reasons set forth above, the ruling of the trial court should be upheld. The Judgment and Decree of Specific Performance, with the Order On Supplemental Findings, issued by the trial court should be affirmed. Appellant should pay all costs of the appeal.

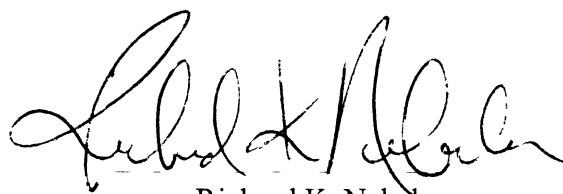
Nebeker, McConkie & Wright  
 5-6-96  
Richard K. Nebeker  
Attorney for Plaintiff/Appellant

Nebeker, McConkie & Wright  
 5-6-96  
Stacey G. Schmidt  
Attorney for Plaintiff/Appellant

Certificate of Hand Delivery

I hereby certify that on the <sup>6<sup>th</sup></sup> day of May, 1996, I caused to be hand delivered, a true and correct copy of the foregoing Brief of Appellee, to Appellants counsel as follows:

James L. Christensen  
Corbridge Baird & Christensen  
Attorney for Defendant/Appellant  
39 Exchange Place, Suite 100  
Salt Lake City, Utah 84111-2705



Richard K. Nebeker

#### ADDENDUM

1. Letter from Harris to Shields, dated November 5th, 1993.
2. Letter from Harris to Shields' attorney, dated November 12th, 1993.
3. Title Report by Stewart Title.
4. Letter from Shield's attorney to Harris dated August 2, 1993.



## **DOCUMENT 1**



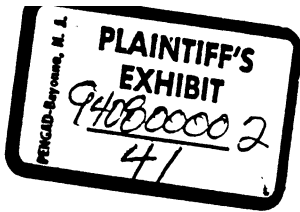
Nov. 5<sup>th</sup> 1998

Joe Shields

after you read this over, Please Ca  
me. No Judge in the State of ~~Mass~~  
would ever make me sell My ranch  
for less than \$265,000.<sup>00</sup> That's My  
Price to you, Take it or leave it  
I will accept, \$100,000.<sup>00</sup> down  
\$30,000.<sup>00</sup> a year on annual Basis. Balan  
of Mortgage at 8% Interest  
Five (5) years from date of Contract, a  
\$50,000. balloon Payment. Total Pay  
off of Contract ten (10) years, from date of  
Contract. This is flexible if you want to  
talk about it.

Yours Truly  
Walter Harris

## **DOCUMENT 2**



# A A Harris Enterprises

2533 East 6200 South  
Salt Lake City, Utah 84121  
(801) 277-5722

Richard K. Meeker  
attorney at Law

Nov. 12<sup>th</sup> - 1993  
Prof. Joseph Shick

Dear Sir:

Over one Month ago, I was in your office, Nothing has happen since. I gave you three Copies of My appraisals. I did Not get any appraisals from you. Would you be so Kind, to send me 2 or three of your appraisals. Lets Put this matter to rest, once & for all. With the figures I have enclosed for you to read (I had to prepare this figure for the Government - I.R.S.) a few yrs ago. Note; the Court & Judge will see these figures - And No Way in Hell, will the Judge make me sell the Ranch, for less than the \$275,000. I told you & I told Joe - He can have it for \$265,000 take it or leave it. I Want a Commitment by Dec. 15<sup>th</sup> 1993. (over)

Leave it for the Next three years; <sup>page 11</sup>  
Buy it Now for the \$265,000<sup>00</sup>  
or - after the Next 3 yrs - the  
Price will be much higher like  
\$300,000<sup>00</sup> or \$320,000<sup>00</sup>  
My Bench have the Value there.

Please let me know, what Joe  
Childs wants to do - Maybe you  
can read this letter to him over the  
telephone - (He has all the other papers)  
you might as well tell him, I'm for  
in what I want, \$265,000<sup>00</sup> & Not a  
Penny less.

We are Moving to our Winter Home  
Monday. Please write me at.

Anil A. Harris  
Post Office Box 460-0701  
Leeds, MA  
84746-0701

My Phone # - 879 2461  
Thanks. Sincerely  
Anil A. Harris

## **DOCUMENT 3**

COMMITMENT FOR TITLE INSURANCE  
ISSUED BY



Seal of the American Land Title Association

**STEWART TITLE**  
GUARANTY COMPANY

*Received*

STEWART TITLE GUARANTY COMPANY, A Texas Corporation, herein called the Company, for a valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest covered hereby in the land described or referred to in Schedule A, upon payment of the premiums and charges therefor; all subject to the provisions of Schedules A and B and to the Conditions and Stipulations hereof.

This Commitment shall be effective only when the identity of the proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A hereof by the Company, either at the time of the issuance of this Commitment or by subsequent endorsement.

This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate six months after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company.

Signed under seal for the Company, but this Commitment shall not be valid or binding until it bears an authorized Countersignature.

IN WITNESS WHEREOF, Stewart Title Guaranty Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers on the date shown in Schedule A.

**STEWART TITLE**  
GUARANTY COMPANY

*Stewart Morris Jr.*  
Chairman of the Board  
Countersigned by:

*[Signature]*  
Authorized Signatory

Company

City, State



*Stewart Morris*  
President

SUNRISE TITLE COMPANY  
193 NORTH STATE STREET 73-13  
ROOSEVELT, UTAH 84066  
(801) 722-2257

RE: COMMITMENT  
FILE NUMBER R93326A  
WESTERN FARM CREDIT BANK/SHIELDS

SCHEDULE - A

1. Effective Date September 15, 1993 @ 8:00 A.M.

2. Policy or policies to be issued:	Amount	Premium
(A) ALTA Owner's Policy--Proposed Insured: Joseph W. Shields.	\$TBD	\$TBD

(B) ALTA Loan Policy--Proposed Insured: Western Farm Credit Bank.	\$TBD	\$TBD
--	-------	-------

Endorsements: \$

Additional Charges (if any): Multiple Sections \$300.00

TOTAL PREMIUM \$TBD

3. The estate or interest in the land described or referred to in this commitment and covered herein is fee simple in and to the surface rights only and title thereto is at the effective date hereof vested in:

AA & M, L.C., A UTAH LIMITED LIABILITY COMPANY. (PARCELS 7, 8 & 9)

4. The land referred to in this commitment is described as follows:

STATE OF UTAH, COUNTY OF DUCHESNE.  
TOWNSHIP 8 SOUTH, RANGE 17 EAST, SALT LAKE BASE AND MERIDIAN.  
SECTION 21: Southeast Quarter. (Parcel 7)

SECTION 27: West Half Northwest Quarter. (Parcel 8)

SECTION 28: North Half Northeast Quarter. (Parcel 9)



RE: COMMITMENT  
FILE NUMBER R93326A  
WESTERN FARM CREDIT BANK/SHIELDS  
PAGE NUMBER 2

## **SCHEDULE B - Section 1**

### **Requirements**

The following are the requirements to be complied with:

- A. Payment to Sunrise Title Company for the premiums, fees and charges for the policy.

**Note:** In the event the transaction for which this commitment is furnished does not close within thirty (30) days, the minimum fee due and payable is \$300.00.

- B. Release(s) or reconveyance(s) of Exception(s) numbered 14 through 21.
- C. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.
- D. Proper instrument(s) creating the estate or interest to be insured must be executed and duly filed for record.
- E. Payment of all taxes, charges or assessments levied and assessed against said property which are due and payable.
- F. Notify Sunrise Title Company in writing, the name of anyone not referred to herein who will obtain an interest in and/or who will make a loan on the property. Sunrise Title Company may then make additional requirements or exceptions.
- G. Any escrow closed by Sunrise Title Company involving the purchase of property, requires an Owners Title Policy or, in the alternative, a Waiver of Insurance and Hold Harmless Agreement signed by the purchaser.
- H. Borrower's Affidavit as to Debts and Liens.

RE: COMMITMENT  
FILE NUMBER R93326A  
WESTERN FARM CREDIT BANK/SHIELDS  
PAGE NUMBER 3

## SCHEDULE B - Section 2

### Exceptions

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company:

1. Rights or claims of parties in possession not shown by the public records.
2. Easements, or claims of easements, not shown by the public records.
3. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, and any facts which a correct survey and inspection of the premises would disclose and which are not shown by the public records.
4. Any lien, or right to a lien, for services, labor or material heretofore and hereafter furnished, imposed by law and not shown by the public records.
5. Unpatented mining claims; reservations or exceptions in patents or in acts authorizing the issuance thereof.
6. Mineral rights, water rights, claims and/or title to said minerals or water.
7. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
8. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this Commitment.

NOTE: EXCEPTION EIGHT WILL NOT APPEAR IN ANY POLICY TO BE ISSUED HEREUNDER.

9. This property is within the boundaries of Central Utah Water Conservancy District and Johnson Water District and is subject to all charges and/or assessments levied thereby. Said charges are assessed through the general county tax levy and may be subject to rollback and/or reassessment. The total general county assessment for 1992 was \$527.51, \$152.75 and \$258.48, Reference Serial Number 4878, 4886, and 4887.

According to the official records of Duchesne County, all of said assessments have been paid current through 1992. Taxes for 1993 are a lien but not yet due and payable.

10. Assessment and taxation under the 1969 Farmland Assessment Act (Greenbelt) together with any roll-back provision provided there under.  
Affects: Parcels 7, 8, and 9

RE: COMMITMENT  
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WESTERN FARM CREDIT BANK/SHIELDS  
PAGE NUMBER 4

11. County road along North line of subject property.  
Affects: Parcel 7
12. Any right, title or interest of the estate of Randall Felter.
13. An easement for the purpose shown below and rights incidental thereto as set forth in a document  
Granted to: Myton Water Association  
(No representation is made as to the present ownership of said easement)  
Purpose: Right-of-ways  
Recorded: April 29, 1971  
Book: A-16 Page: 110-117  
Entry Number: 156696 through 156699  
Affects: Parcel 7
14. A mortgage to secure an indebtedness as shown below, and any other obligations secured thereby  
Amount: \$32,100.00  
Dated: May 27, 1976  
Mortgagor: James M. Rice and Carol L. Rice  
Mortgagee: Farmers Home Administration  
Recorded: June 18, 1976  
Book: A-49 Page: 257-260  
Entry Number: 189619  
Affects: Parcels 7, 8 and 9
15. An unrecorded Real Estate Contract between the following parties:  
Dated: April 8, 1976  
Seller: Arvil A. Harris and Mary S. Harris  
Buyer: Richtron Inc., a Utah Corporation

*Break in chain  
of title.*

The above described Real Estate Contract is referenced and affected by the following described documents:

Notification of Contract  
Recorded: April 17, 1978  
Book: A-60 Page: 505-506  
Entry Number: 197388  
Affects: Parcels 7, 8, and 9

Assignment of Contract  
Dated: March 14, 1980  
Assignor: Richtron, Inc.  
Assignee: Utah Farm Production Credit Association  
Recorded: April 1, 1980  
Book: A-73 Page: 14-22  
Entry Number: 207484  
Affects: Parcels 7, 8, and 9

RE: COMMITMENT  
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PAGE NUMBER 5

Notification of Sale of Interest and Assignment

Dated: July 31, 1981  
Assignor: Richtron, Inc.  
Assignee: Frontier Investments, a Utah Corp.  
Recorded: October 29, 1982  
Book: A-95 Page: 398-399  
Entry Number: 227205  
Affects: Parcels 7, 8, and 9

Quit-Claim Deed

Dated: June 10, 1982  
Grantor: Richtron, Inc.  
Grantee: Frontier Investments, a Utah Corp.  
Recorded: October 29, 1982  
Book: A-95 Page: 400  
Entry Number: 227206  
Affects: Parcels 7, 8, and 9

Notice of Rights and Interests in Real Property and Improvements

Dated: August 1, 1984  
Buyer: Frontier Investments, as assignee of Richtron, Inc.  
Seller: Arvil A. Harris and Mary S. Harris  
Recorded: August 6, 1984  
Book: A-116 Page: 784-785  
Entry Number: 240648  
Affects: Parcels 7, 8, and 9

16. An unrecorded Real Estate Contract between the following parties  
Dated: December 19, 1978  
Seller: Virginia Felter, Marion Felter and Elizabeth Felter  
Buyer: Richtron, Inc., a Utah Corporation  
Affects: Parcels 7, 8 and 9

The above described Real Estate Contract is referenced and affected by the following described documents:

Assignment of Contract

Dated: March 14, 1980  
Assignor: Richtron, Inc.  
Assignee: Utah Farm Production Credit Association  
Recorded: April 1, 1980  
Book: A-73 Page: 6-13  
Entry Number: 207483

RE: COMMITMENT  
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Notification of Sale of Interest and Assignment  
Dated: July 31, 1981  
Assignor: Richtron, Inc.  
Assignee: Frontier Investments, a Utah Corp.  
Recorded: October 29, 1982  
Book: A-95 Page: 398-399  
Entry Number: 227205  
Affects: Parcels 7, 8, and 9

Quit-Claim Deed  
Dated: June 10, 1982  
Grantor: Richtron, Inc.  
Grantee: Frontier Investments, a Utah Corp.  
Recorded: October 29, 1982  
Book: A-95 Page: 400  
Entry Number: 227206  
Affects: Parcels 7, 8, and 9

Notice of Rights and Interest in Real Property and Improvements  
Dated: August 1, 1984  
Buyer: Frontier Investments, as assignee of Richtron, Inc.  
Seller: Virginia Felter, Marion Felter and Elizabeth Felter  
Recorded: August 6, 1984  
Book: A-116 Page: 786-787  
Entry Number: 240649  
Affects: Parcels 7, 8 and 9

17. Agreement and Lien  
Amount: \$35,000.00  
Dated: May 9, 1983  
Debtor: Arvil A. Harris  
Creditor: U.S.A., acting through the Agriculture Stabilization and Conservation Service,  
United States Department of Agriculture  
Recorded: September 28, 1983  
Book: A-106 Page: 35-36  
Entry Number: 233906  
Affects: Parcels 7, 8 and 9
18. Agreement and Lien  
Amount: \$31,550.00  
Dated: March 5, 1986  
Debtor: Arvil A. Harris  
Creditor: U.S.A., acting through the Agriculture Stabilization and Conservation Service,  
United States Department of Agriculture  
Recorded: November 17, 1986  
Book: A-153 Page: 164-165  
Entry Number: 257381  
Affects: Parcels 7, 8 and 9

RE: COMMITMENT  
FILE NUMBER R93326A  
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PAGE NUMBER 7

19. Any interest of Nelson Farms, as disclosed by their execution of the Agreement and Lien referenced below. At the date of said Agreement and Lien, said mortgagors had no record interest in said land, nor have they since acquired any.  
Amount: \$34,184.00  
Dated: September 10, 1985  
Mortgagor: Nelson Farms  
Mortgagee: U.S.A., acting through the Agriculture Stabilization and Conservation Service, United States Department of Agriculture  
Recorded: September 30, 1985  
Book: A-134 Page: 597-598  
Entry Number: 249129  
Affects: Parcel 8
20. Notice of Interest  
Dated: April 19, 1993  
Lessor: Arvil A. Harris  
Lessee: Joseph W. Shields  
Recorded: April 19, 1993  
Book: A-224 Page: 280  
Entry Number: 293553  
Said Notice of Interest references a lease dated May 1, 1987.  
Affects: Parcels 7, 8 and 9
21. Option to Purchase  
Dated: February 10, 1987  
Seller: Arvil A. Harris  
Buyer: Joseph W. Shields  
Recorded: April 20, 1993  
Book: A-224 Page: 343-344  
Entry Number: 293579  
Affects: Parcels 7, 8 and 9

RE: COMMITMENT  
FILE NUMBER R93326A  
WESTERN FARM CREDIT BANK/SHIELDS  
PAGE NUMBER 8

**SCHEDULE B - Section 3**

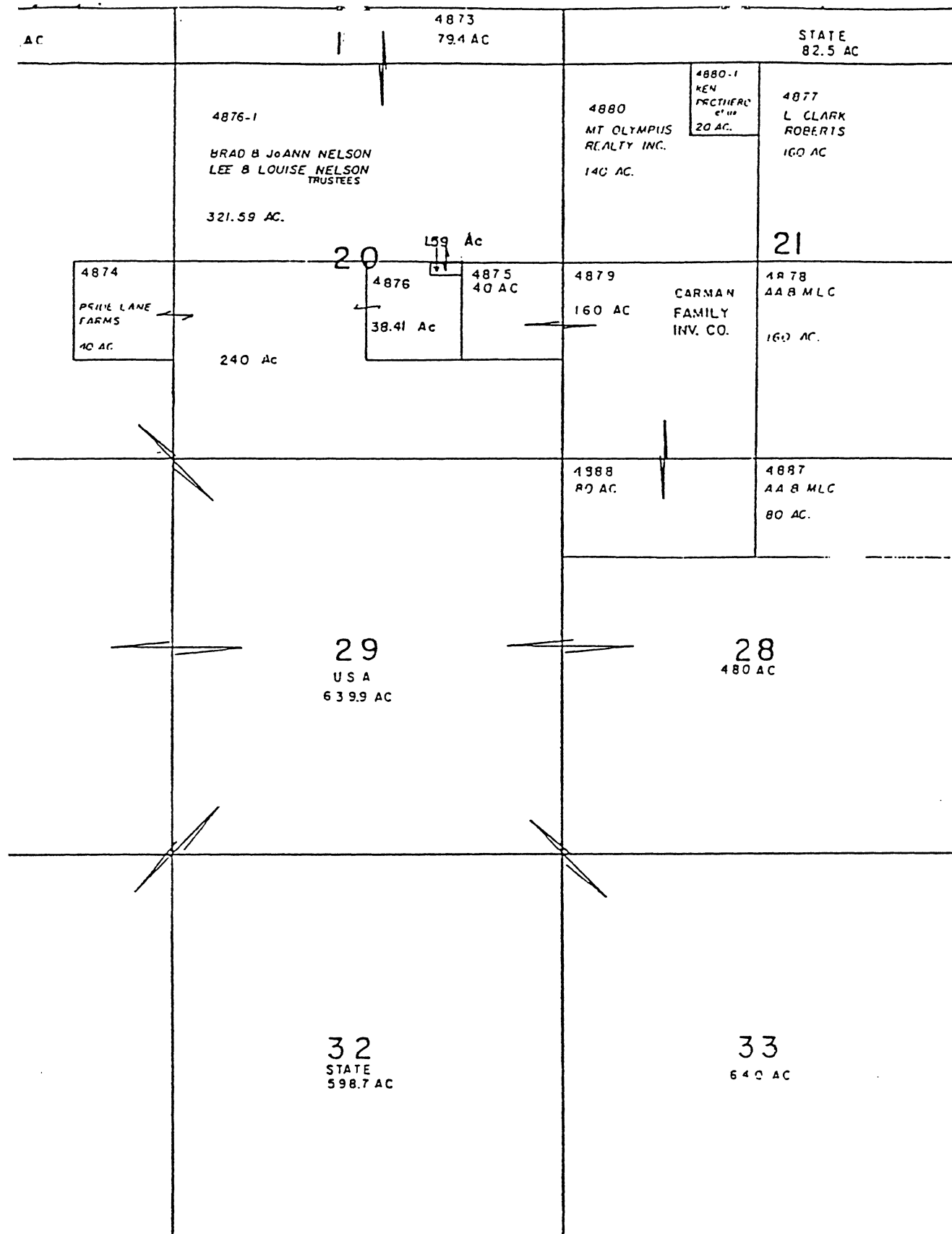
**Abstracter Notes**

Any matter in dispute between you and the Company may be subject to arbitration as an alternative to court action pursuant to the Title Insurance Rules of the American Arbitration Association, a copy of which is available on request from the Company. Any decision reached by arbitration shall be binding upon both you and the Company. The arbitration award may include attorney's fees if allowed by state law and may be entered as a judgment in any court of proper jurisdiction.

2. Names checked and cleared for liens and judgments of record, except as noted herein, are as follows:  
AA & M, L.C.  
Joseph W. Shields  
Arvil A. Harris  
Mary S. Harris  
Randall Felter  
Marion Felter  
Virginia S. Felter

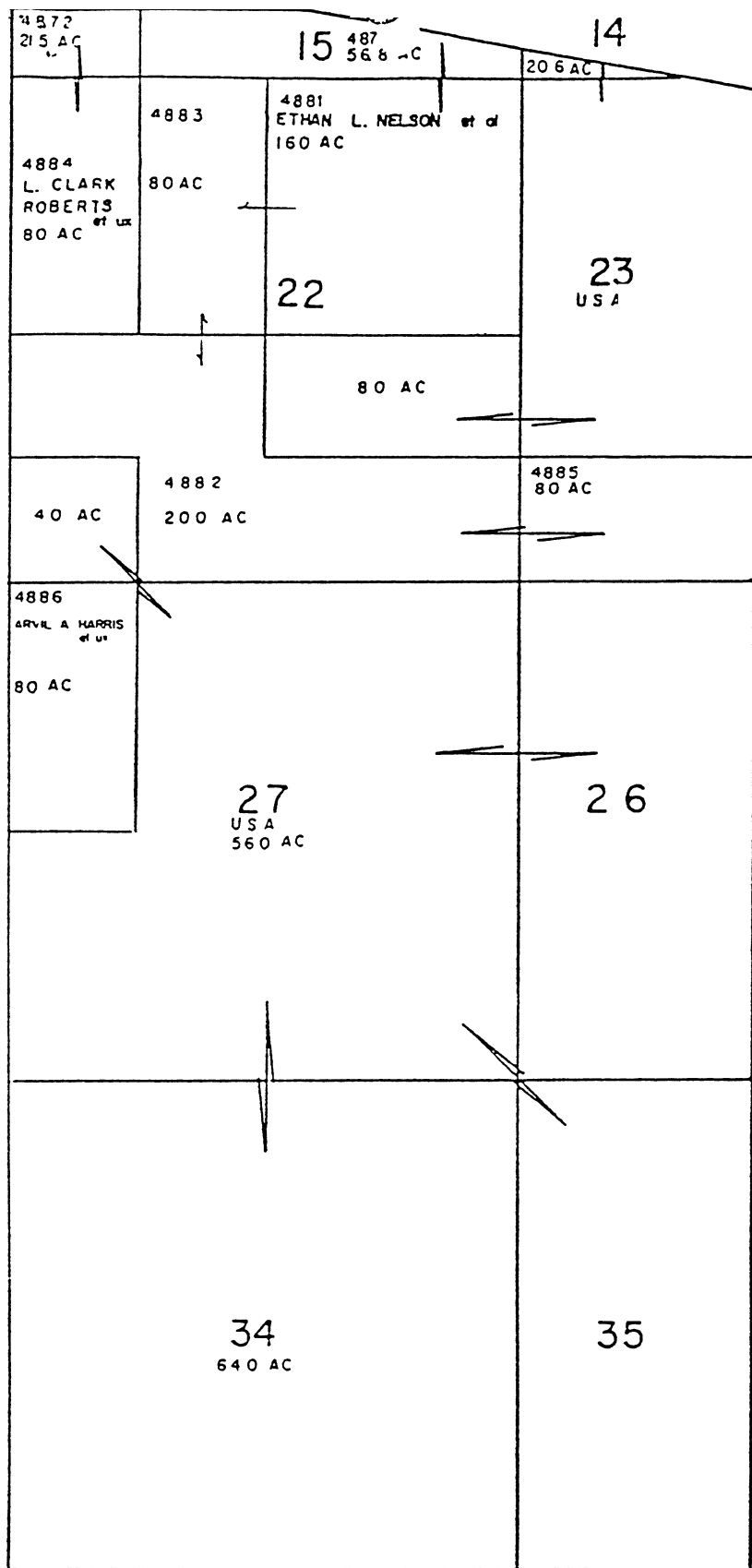
SUNRISE TITLE COMPANY  
193 North State Street (73-13)  
Roosevelt, Utah 84066  
(801) 722-2257

**STEWART TITLE**  
GUARANTY COMPANY



PLAT PROVIDED FROM COUNTY RECORDS  
FOR INFORMATION PURPOSES ONLY.  
NO GUARANTEE AS TO CONTENT AND/OR  
ACCURACY.





SCALE 1" = 1200'

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ACCURACY.

**DOCUMENT 4**

# Exhibit 38

## NEBEKER & HOOLE, P.C.

ATTORNEYS AT LAW  
BENEFICIAL LIFE TOWER, SUITE 2040  
36 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84111  
TELEPHONE (801) 532-7373  
FACSIMILE (801) 532-5453

RICHARD K. NEBEKER  
ROGER H. HOOLE

August 2, 1993

Frederick N. Green  
GREEN & BERRY  
10 Exchange Place #622  
Salt Lake City, Utah 84111

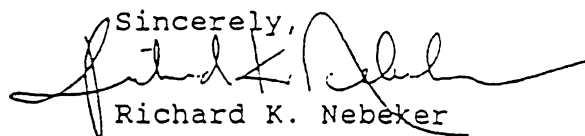
Dear Mr. Green,

I represent Joe Shields with respect to a Lease Agreement and Option To Purchase on property titled in the name of your client, Arvil Harris. Mr. Shields was previously represented by the law firm of Callister, Duncan & Nebeker. However, it has been brought to the attention of Callister, Duncan & Nebeker that Mr. Harris currently does his estate planning through Lee McCullough, an attorney with Callister, Duncan & Nebeker. Because of this conflict of interest, I will be handling the case from here on.

I have reviewed the Lease Agreement and Option To Purchase and believe them to be binding contracts, legally entered by the parties for good and valuable consideration and without fraud, duress, or illegality. Please be on notice that Mr. Shields intends to exercise his option to purchase the subject property pursuant to the option to buy contract.

Mr. Shields has now obtained four of the five required appraisals of the subject property. The remaining appraisal, through the Soil Conservation Service in Roosevelt, presents a problem. The Soil Conservation Service has refused to so conduct an appraisal, indicating that they are not qualified. Accordingly, we must agree to either waive the Soil Conservation appraisal, or agree on who the fifth appraiser should be to take their place. Mr. Shields is agreeable to waiving the fifth appraiser and is willing to offer \$500 towards the purchase price, in lieu of paying another appraisal fee. Please let me know how your client desires to proceed in this regard.

X This correspondence is intended to give you notice that Mr. Shields is now ready, willing, and able to exercise his option to purchase the property by paying Mr. Harris the purchase price. We expect to receive good and marketable title to the subject property free and clear of all encumbrances. Please provide evidence that Mr. Harris now has marketable title to the subject property, free and clear of any and all liens and encumbrances. At your convenience, we would like to schedule a closing date with a local title company in Duchesne. I look forward to your response.

Sincerely,  
  
Richard K. Nebeker