

2006

John J. Bradley and Darby G. Bradley v. Douglas J. Markham and Andrea Markham : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JOHN J. BRADLEY and DARBY G.
BRADLEY,

Defendants/Appellants,

vs.

DOUGLAS J. MARKHAM and ANDREA
MARKHAM,

Plaintiffs/Appellees.

**REPLY BRIEF OF APPELLANTS
JOHN J. BRADLEY and DARBY
G. BRADLEY**

Appellate Case No. 20061022

Appeal from final judgment and order of the Fifth Judicial District Court for
Washington County, State of Utah.

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ARGUMENT

I. The Bradley's preserved the argument that a subjective standard governs their decision to cancel the REP-C.

In arguing that the Bradleys failed to preserve the issue of whether an objective or subjective standard applies to the covenant of good faith and fair dealing, the Markhams fail to consider argument by the Bradley's counsel. The Markhams assert that pages 405 to 408 of the transcript do not contain the word "subjective." According to the Markhams' reasoning, because the Bradleys' trial counsel failed to state the word "subjective," the Bradleys waived all rights to use that word on appeal. It is true that trial counsel never mentioned the word subjective, but pages 405 to 408 of the trial transcript contain explicit argument by the Bradley's trial counsel that the plain language of the REP-C permitted the Bradleys to reject the Markham's credit information based on their own unique situation and preferences (i.e. based on their own subjective evaluation of the Markham's credit). Although couched in different terms, trial counsel's reference to the Bradleys' unique and personal circumstances preserved their ability to use the term "subjective" on appeal.

At trial, the Bradleys trial counsel argued "[Section] 8.1 of the contract of the seller financing addendum and says, hey, look, sellers, *you* review the financing and what it specifically states." [Trial Transcript 405:21-22 (emphasis added)]. This statement refers to the fact that the contract granted the Bradleys subjective discretion to review the Markhams' credit information. The trial court then asked "what do you say about the extent of discretion allowed to a seller under that paragraph?" [TT 406:10-11]. The Bradleys' counsel responded, "Oh...I agree with [the Markhams]. I believe in the case law as [they] cited [it] and the research that I found [indicates] that there is an implied covenant of good faith and

fair dealing.” [TT 406:12-13]. Then (just as the Bradleys argued in their Brief in Chief) the Bradleys’ trial counsel argued, “but [the] implied covenant can’t create rights for the parties that they haven’t already created themselves.” [TT 406:15-17]. This argument, when viewed together with counsel’s prior statement “Hey look, sellers, *you* review the financing and what it specifically states” is the same argument that the Bradleys make in Section I-a of their Brief in Chief which the Markhams now claim was never made. [Brief of Appellant, at 22-27].

After thus framing his argument, the Bradleys’ trial counsel recited different facts supporting his argument that the Bradley’s had personal reasons to be subjectively dissatisfied with the Markham’s credit. [TT 406:18 through 408: 25]. First he highlighted that the Markhams were loaning money as inexperienced individual lenders and not as professional lenders like Countrywide. [TT 406:18 through 407:3]. Next trial counsel notes that if the Bradley’s were required to foreclose on the loan they had made to the Markhams after selling the home, it would significantly affect their personal lives and personal finances. [TT 407:9-15]. Finally, counsel notes that the Markhams’ financial information appeared sloppy and disorganized. [TT 408:15-23]. This fact also created significant personal concerns for the Bradleys, who would have to deal with the Markhams on a personal level until the balance on the loan was paid.

Thus, although the Bradleys’ trial counsel did not specifically mention the word “subjective,” he did argue that the plain language of the REP-C permitted the Bradleys to be subjectively dissatisfied with the Markham’s credit, and this issue is appropriately before this Court.

II. The Markhams misunderstand that the subjective reasonable standard stems from the plain language of the REP-C and not common law.

The Markhams misconstrue the character of the Bradley's argument relating to the covenant of good faith in their opening brief. To clarify, the Bradleys argue on appeal that the trial court committed two errors relating to the legal standard for breach of the covenant of good faith and fair dealing. First, the trial court erroneously used an objective reasonableness standard when evaluating the scope of the covenant of good faith in a contract provision that specifically granted Defendants the right to be subjectively dissatisfied with the Markhams' credit information. Second, the trial court erroneously used an objective professional lender standard to evaluate the reasonableness of the Bradley's decision to not loan money to the Markhams. The Markhams assail the former argument, but fail to even consider the latter.

The Markhams' assertion that the covenant of good faith is governed by an objective reasonableness standard ignores that the Bradley's right to be subjectively dissatisfied with the Markhams credit stems from the plain language of the REPC and not from common law rights as contracting parties. Additionally, the trial court required the Bradleys to act against their own best interests in order to satisfy the covenant of good faith. The Markhams do not refute the Bradleys argument that Section 8.1 of the REPC altered the traditional common law rule.

Additionally, the Markhams do not refute that even under a standard of objective reasonableness, the trial court erroneously compared the reasonableness of the Bradleys' decision to not loan the Markhams money to the reasonableness of the same decision made by a professional lender. In fact, the Markhams introduced no evidence to support their

assertion that a reasonable person in a similar situation as the Bradleys would have loaned money to the Markhams.

A trial, the Markhams introduced the following evidence to support their claim that an objective reasonable person in the Bradley's position would loan the Markhams money.

- Country-wide, a professional lender, agreed to loan the Markhams an amount equivalent to the amount that the Bradley's considered loaning to the Markhams. [*See* Addendums "8" and "9" of Appellant's opening brief].
- The REPC included a no penalty prepayment provision that prevented the Bradleys from penalizing the Markhams for paying the loan off early. [R. 271].
- The Markhams had credit scores in the high 600, low 700 range. [R. 281].

The Bradleys do not dispute these factual findings, but argue that countervailing negative aspects of the Markham's credit information, which are not in dispute, indicate that the Bradleys were reasonable in refusing to loan money to the Markhams. [Brief of Appellee, at 24-31]. The following undisputed evidence indicates that the Bradleys were reasonable in deciding to not loan money to the Markhams:

- The Markhams had previously declared bankruptcy. [R. 281].
- Various and recent late payments appeared on the Markhams' credit report. [R. 281].
- A tax lien appeared on Mr. Markham's credit report. [TT 56:15-17].
- The Bradleys consulted with an attorney in deciding to cancel the REPC based on the Markhams credit information. [R. 281].
- The Markhams did not transmit the required credit information by the date required by the contract. [TT 219:16-20];
- The Markham's financial documents were disorganized, had portions that were covered with white-out and handwritten over, and looked extremely unprofessional. [R 280].

An additional fact to that the trial court considered when evaluating whether the Bradley's decision to not loan money to the Markhams based on the financial documents, was the Bradleys motivation for cancelling the contract. The Court concluded that the Bradleys' proffered concerns over the Markhams financial documents elevated form over substance and that the Bradleys cancelled the contract not because of any concerns over the Markhams credit, but because the Bradleys had decided for other reasons that they did not want to sell the house. The Bradley's contend that this factual finding is irrelevant to the trial court's task of determining whether the Bradleys acted in good faith—especially under an objective standard. Subjective motivation by definition is irrelevant under an objective standard. However, even assuming that the Bradley's subjective motivation is relevant, there is a critical error in the trial court's reasoning. The trial court ignored the Bankruptcy judgment, tax lien, late payments, and the late and disheveled condition of the Markham's financial documents in determining that it was objectively unreasonable for an amateur lender to refuse to loan money to the Markhams.

The trial court could not close its eyes to undisputed evidence in making its determination under the covenant of good faith. The Markhams' evidence indicates the reasonableness of the Bradley's decision and the Bradley's evidence indicates the opposite. The fact that a conflict *exists* indicates that the Bradleys acted reasonably. The Bradleys were presented with two choices—both reasonable. They could have either loaned money to the Markhams or cancelled the contract. The fact that it would have been reasonable to loan money to the Markhams does not necessarily invalidate the conclusion that it was *also* reasonable to not loan the money.

Importantly, the Markhams efforts to minimize the impact of the evidence indicating that the Bradleys acted reasonably are irrelevant. The Markhams seek to excuse the tax lien and bankruptcy judgment that appear on their record by claiming that the bankruptcy was remote and that the tax lien was an error. A careful reading of these arguments reveals that they are irrelevant because the Markhams **never** testified that they informed the Bradley's of these justifications prior to the Bradleys' decision to cancel the REPC. These arguments were only made at trial for the purpose of casting the evidence in the light most favorable to the Markhams. However, a close analysis of the testimony reveals that there is no relevant inference to be drawn from these arguments.

III. The Trial Court erred in denying the Bradley's motion for a new trial.

Under Utah R. Civ. P. 59, a trial court may either award a new trial or "direct the entry of a new judgment" upon a showing of legal error. The Markhams make three points in disputing the Bradleys' argument that the trial court erroneously denied their New Trial Motion. First, the Markhams argue that the issues raised in the Bradleys' New Trial Motion are not the same as those raised in the Bradleys' Brief in Chief before this Court. Second, the Markhams argue that the Bradleys did not sufficiently marshal the evidence in challenging the trial court's decision to deny the New Trial Motion. Third, the Markhams argue that, even ignoring the alleged procedural errors, the trial court appropriately denied the Bradleys' New Trial Motion. Each of these arguments is without merit. Additionally, the Markhams misstate the standard of review for this issue. [Brief of Appellee, at 21].

A. This court should review the trial court's decision denying the Bradleys' motion for a new trial under a correction of error standard.

The Markhams erroneously contend that the standard of review related the trial court's decision to deny the Bradley's new trial motion grants significant deference to the trial court. This assertion misunderstands Utah case law regarding standards of review. The standard of review for a trial court's decision granting or denying a new trial motion differs depending on the type of legal issue involved in the new trial motion. For example, if the issue involved in the new trial motion is a pure legal question, an appellate court will review the trial court's decision under a correction of error standard. *Booth v Booth*, 134 P 3d 1151, ¶ 10, (Utah Ct App 2006). If the issue involved in the new trial motion accords the trial court more deference, the appellate court will accordingly apply a more deferential standard of review to the trial court's decision. *Id* (Noting that the traditional standard for a new trial motion is abuse of discretion standard)

In the present case, the Bradleys are not challenging the trial court's specific factual findings, but argue that these findings are insufficient to support the legal conclusion that the Bradleys' decision to not loan money to the Markhams breached the covenant of good faith and fair dealing. Application of a legal concept to a given set of facts is a mixed question of law and fact. *State v Levin*, 2006 UT 50, ¶ 21, 144 P 3d 1096. The Utah Supreme Court observed, "[t]he analytical complexity of our standard of review is at its height when we review a trial court's application of a legal concept to a given set of fact." *Id*. The standard of review for such "mixed questions of fact and law" differs depending on the legal issue. *Id*. Utah appellate courts consider three factors when determining the amount of deference to grant a trial court's decision regarding a mixed question of fact and law.

(1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on facts observed by the trial judge...that cannot be adequately reflected in the record available to appellate courts; and (3) other policy reasons that weigh for or against granting discretion to trial courts. *Id.* at ¶ 25 (quotations omitted).

The policy considerations referred to by the third factor balance the functions and strengths of trial and appellate courts. *Id.* at ¶ 20. A trial court is in the best position to judge witness and evidence credibility. *Id.* An appellate court determines what the law is and ensures uniform application of the law throughout the appellate court's jurisdiction. *Id.* The policy balancing factor is the most important factor in this test because even if the first two factors support a deferential standard of review, policy considerations may nonetheless prevent an appellate court from deferring to the trial court's decision. *Id.* at ¶ 26.

In the present case, all three factors favor imposing a correction of error standard of review to the trial court's decision in the present case. First, the variety and complexity of the facts relating to whether the Bradleys breached the covenant of good faith are simple and straightforward. Second, the Bradleys are not challenging the underlying factual findings on which the trial court relied in holding that the Bradleys did not act in good faith and, thus, evidence credibility is not an issue. Third and finally, policy considerations favor a less deferential standard of review. The covenant of good faith applies to every contract that is governed by Utah common law. *Oakwood village v. Albertsons, Inc.*, 2004 UT 101, ¶42, 104 P.3d 1226. If affirmed, the trial court's decision holding the Bradleys liable for breaching the covenant of good faith when undisputed evidence indicated that they acted reasonably, would result in increased contract litigation, increased uncertainty between contracting parties and a decreased uniformity of the law.

Because the balancing test for determining appellate deference to decisions involving mixed questions of fact and law favors a correction of error standard, the Markhams have incorrectly stated the standard of review for this issue, and this Court should apply a correction of error standard of review to the trial court's decision denying the Bradleys motion for a new trial

B. The issues on appeal regarding the Bradley's good faith actions are the exact issues raised in the Bradley's New Trial Motion.

The Markhams contend that the issues raised in the Bradley's New Trial Motion are not the same as the issues raised on appeal. The Markhams therefore argue that the procedural default rule (which bars claims on appeal that were not brought at trial) bars the Bradley's from arguing these issues on appeal. The Markhams' interpretation of the procedural default rule is so strict that it would only permit an appellate court to review an argument if the party used the exact same language on appeal as the party used at trial. Appellate brief-writing would be a matter of copying and pasting portions of trial motions and memoranda into an appellate brief.

Hyperbole aside, the Markham's assertion that the Bradley's argument on appeal is different than the argument at trial reflects a plain misreading of the Bradleys' New Trial Motion. The Bradley's argument on appeal is, in fact, the exact same argument raised in the new trial motion. In the Bradley's new trial motion they argued that "the evidence is insufficient to show that the Bradleys' decision to cancel the REPC was not done in good faith." [R. 399]. In support of this argument the Bradleys identified six undisputed facts that indicate their good faith action.

1. The Markhams had previously gone through a bankruptcy and/or judgment against them.
2. The Bradleys were concerned about the amount of credit being extended to the Markhams at that time.
3. The documents appeared to have missing pages and potential mounts of the report being cut off or improperly copied.
4. The Markhams had had whited-out sections of the financial information.
5. Several sections were illegible.
6. The Markham's credit report contained some delinquencies.

[R. 400]. The Bradleys rely on these same facts in their opening brief to demonstrate that the trial court's legal errors justified alteration of the trial court's judgment or grant of a new trial. [Brief of Appellant, at 34-37]. The Markham's assertion that the Bradley's argument on appeal is different than that in the new trial motion is incorrect. In the New Trial Motion and on appeal the Bradleys rely on the same law and facts and make the same argument.

C. The Bradley's adequately marshaled the evidence in support of their arguments.

The Markhams attack the Bradleys' marshalling attempts as inadequate. The Markhams' arguments relating to marshalling misunderstand the purpose of the marshalling requirement and the nature of the Bradley's argument. The purpose of marshalling evidence is to prevent an appellant from retrying the facts of the appellant's case and to assist the appellate court in opinion writing and decision making. *Chen v. Stewart*, 2004 UT 82, ¶ 79. 100 P.3d 1177.

Furthermore, as the Markhams observe, an appellant is required to marshal only facts related to challenged factual findings. *Chen*, 2004 UT at 77. The marshalling requirement does not require a party to present an “exhaustive review of all evidence presented at trial.” *Id.* It requires that the appellant “provide a *precisely focused summary* of all evidence supporting the findings they challenge.” *Id.* (emphasis added). “This summary must correlate all particular items of evidence with the challenged findings and then convince [the appellate court] that the trial court erred in the assessment of that evidence to its findings.” *Id.*

Here, the Bradleys’ marshalling efforts were sufficient to satisfy the purposes of the marshalling requirement. The Bradleys have not attempted to slant the facts in their favor and are not attempting to retry the case on a factual level before this Court. In fact, the Bradleys are not disputing any of the trial court’s factual findings. The Bradleys have consistently asserted that even accepting the trial court’s factual findings, those findings do not support the legal conclusions that the Bradleys waived their contractual rights under the REPC and breached the covenant of good faith.

The Bradleys provided this Court with a “precisely focused summary” of all facts supporting the trial court’s legal conclusions. The Bradleys’ marshalling presents an extensive review of the trial court’s factual findings and corresponding testimonial or documentary evidence supporting the trial court’s factual findings conclusion.

The Markhams’ argument related to the Bradleys’ marshalling reflects a plain misreading of the Bradleys’ marshalling attempts. The Bradleys were not challenging the evidence supporting the trial court’s *factual findings*. The Bradleys were challenging that the factual findings supported the trial court’s *legal conclusions*. The Bradleys’ marshalling efforts

were clearly adequate to challenge the trial court's application of the facts to the legal standards involved in this case.

D. The trial court's factual findings did not support its legal conclusions.

Even viewing the factual findings in the light most favorable to the judgment, the Bradley's opening brief highlighted the "fatal flaw" which requires reversal of the trial court's denial of the Bradley's New Trial Motion. The trial court ignored *undisputed* evidence that the Bradleys acted in good faith.

Oakwood Village v. Albertsons, Inc., 2004 UT 101, 104 P.3d 1226, is the most recent Utah Supreme Court Decision involving the covenant of good faith and fair dealing. In *Oakwood*, the Utah Supreme Court indicated that the covenant of good faith cannot force a party to exercise a right "to its own detriment for the purpose of benefiting another party to the contract." *Id.* at ¶ 45 (internal quotations and citations omitted). Additionally, the court cannot use the covenant of good faith to achieve an outcome consistent with the court's notions of fairness, but inconsistent with the expectations of the contracting parties. *Id.*

In the present case, the undisputed evidence indicates that that the trial court used the covenant of good faith to achieve a result consistent with its own notions of fairness, but inconsistent with the expectations of the parties. Additionally, the trial court erroneously required the Bradleys to exercise their duty to act in good faith in a manner that harmed their own interests and that exclusively benefited the Markhams' interests. As demonstrated in section I, *supra*, the Markhams' credit information contained both negative and positive characteristics. On the positive side, the Markhams' credit scores were reasonably high, they had a decent income, and they were pre-qualified for a loan from a professional lender. On

the negative side, they had previously declared bankruptcy, had a tax lien and numerous late payments on their credit report, and presented the financial information in a disorganized manner. Although this evidence supports the inference that it would have been reasonable for the Bradleys to loan money to the Markhams, it does not support the inference that it was *unreasonable* for the Markhams to refuse to loan money to the Markhams. In fact, the evidence supports the opposite conclusion. The fact that the Markhams' credit information had both significantly negative and significantly positive characteristics supports the conclusion that not only would it have been reasonable for the Bradleys to loan money to the Markhams, it was also reasonable for the Bradleys to *not* loan money to the Markhams. The conflicting evidence of the Markhams' creditworthiness only supports the conclusion that the Bradleys acted reasonably. The Bradleys' duty to act in good faith did not extend so far as to completely eliminate their discretion under the plain language of the contract. They merely had to review the Markhams' credit information in good faith. The Bradley's reviewed the information and upon discovery of the prior bankruptcy and other red flags in both the substance and form of the credit information and decided to cancel the sales contract.¹

¹ The trial court made a factual finding that the Bradleys had made a prior decision to not sell the house and thus, cancelled the contract for personal reasons rather than because of their concerns over the Markhams creditworthiness. As argued in the Bradley's Brief in Chief, this factual finding is actually irrelevant when examining the *reasonableness* of a party's actions under the covenant of good faith—especially under an *objective* standard on which the Markhams rely. Assuming, hypothetically, that the Bradleys cancelled the contract under pretext of the credit clause because they found a buyer willing to pay more than the Markhams had offered to pay, it would have nonetheless been reasonable for the Bradley's to cancel the contract because the negative elements of the Markhams' credit alone justified cancellation of the contract. The Bradley's personal reasons for cancelling the contract are irrelevant to whether they acted reasonably in rejecting the Markhams' credit information.

IV. The Bradleys had the right to strictly enforce the September 13 disclosure deadline; they also had the right to have any extension of this deadline in writing.

To establish waiver, a party must show intention to relinquish a right *Soter's Inc v Deseret Fed Sav & Loan Ass'n*, 857 P 2d 935, 940 (Utah 1993) Section 14 of the REP-C entered into between the Bradleys and the Markhams specifically prohibits oral modification of the terms of the REP-C

The Bradleys did not intend to relinquish their contractual right to the disclosure deadline Even if Mr Bradley did give some indication that he would accept the Markhams' financial disclosures past the September 13 deadline, no such arrangement was set forth in writing as required by Section 14 of the REP-C

A. The Bradley's arguments against waiver, presented in their opening brief, were properly preserved at trial or are properly before the Court.

The Markham's argue that the Bradleys failed to preserve any argument against waiver at trial However, each argument was either properly preserved at trial or is still properly before this Court The Markhams correctly state that in order to preserve a substantive argument the appellant must (1) timely raise the issue before the trial court, (2) specifically have raised the issue before the trial court, and 3) have introduced to the trial court supporting evidence or relevant legal authority to support the argument *Hart v Salt Lake County Comm'n*, 945 P 2d 125, 130 (Utah Ct App 1997) (citation omitted), *cert denied*, 953 P 2d 449 (Utah 1997) The facts and arguments in support of the Bradley's assertion that there was never a waiver of the September 13 deadline are

- 1 Undisputed facts establish that both parties performed on the contract as if there was not a waiver, [Issue preserved at TT 263 16 through 265 13]

2. The Bradleys did not believe that Mr. Bradley's actions waived their right to rely on the September 13 deadline; [Issue preserved at R. 258 and R. 262-64].
3. If the Bradley's had waived the deadline, it is unlikely that they would have been concerned about delivering the required disclosures to the Markhams by the September 13 deadline; [Issue preserved at TT 285:10 through 285:14].
4. The trial court ignored that Section 14 of the REPC specifically prohibits oral modifications of its terms; [Issue preserved at TT 404:20 through 405:4].
5. Ms. Norton did not understand by Mr. Bradley's actions that he had waived his right to rely on the September 13 deadline; [Issue preserved at TT 258].
6. There can be no distinct, intentional waiver when uncontested evidence shows that neither party behaved in a manner consistent with waiver. [Issue preserved at TT 263:16 through 265:13]. (Br. of Appellant 37-43).

The Bradleys timely raised the above arguments before the trial court as each assertion is either in the Defendant's Trial Brief, during oral argument for the Motion to Dismiss, or during the Bradleys closing argument. Because the Bradleys timely raised these issues, the trial court had time to review arguments on both sides. Many pages of the Plaintiff's Trial Brief are spent on the issue of waiver. The issue of whether or not the Bradleys waived their right to enforce the September 13 deadline was within the purview of the trial court. The Bradleys discussed their defense to waiver significantly throughout the pleadings of the trial and it was supported by evidence of the Bradleys, the Markhams, and Ms. Norton. Significantly, Ms. Norton's testimony is heavily relied on with respect to whether or not the parties understood the Bradleys actions to be a waiver.

For someone to waive their legal rights, Utah's Supreme Court requires a distinct manifestation of the intention to waive the right. *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993). By requiring a distinct manifestation of intent the Utah Supreme Court "ensure[d] that waiver would not be found from any particular set of facts unless it was clearly intended." *Id.* When neither party acts or relies on the alleged waiver, there can be no waiver.

The facts that support *no waiver* are undisputed. Ms. Norton did not know the deadline was September 13. She admits that if she did know it was September 13 she would have sent the documentation by the 13 of September. She did not interpret Mr. Bradley's actions as a waiver of the deadline. Ms. Norton was mistaken as to the actual date of the deadline. Ms. Norton testified at trial that she was told the deadline was September 30 and that is why she left without leaving any financial information with Mr. Bradley. [TT. 150:22 through 151:5 and 152:22 through 153:4]. The credibility of Mr. Bradley's testimony does not affect whether or not he waived the September 13 deadline. The fact that Ms. Norton did not interpret Mr. Bradley's actions to act as a waiver shows that there was no understanding by either party that the September 13 deadline had been waived.

Despite the necessity of giving wide deference to the trial court's findings, this Court still has the responsibility of assuring that the law is correctly applied. The testimony of Ms. Norton was never called into question and was found to be credible by the trial court. Based upon this credible testimony waiver was improperly applied to the facts at issue.

B. The plain error doctrine allows this court to consider the Bradleys argument that the statute of frauds bars any modification of a contract for the purchase of land.

Even assuming that the argument that the statute of frauds prohibited the oral modification of the contract was not preserved before the trial court, plain error allows this Court to consider the issue now on appeal. The plain error doctrine allows an appellate court to review an issues that was not properly preserved if “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the party, or phrased differently, [the reviewing court’s] confidence in the verdict is undermined.” *Pratt v. Nelson*, 2007 UT 41, ¶ 16, 578 Utah Adv. Rep. 31.

The Bradleys satisfy the three elements of plain error. First, in not applying the statute of frauds to a contract for the purchase of real estate, the trial court committed an error. Secondly, the statute of frauds is a basic legal principle that should have been obvious to the trial court. Finally, the error is harmful the Bradleys. If the trial court found that the statute of frauds barred any oral modifications of the written contract, there is “reasonable likelihood of a more favorable outcome for” the Bradleys.

C. The Bradleys have sufficiently marshaled the evidence challenging the trial court’s determination.

The Bradleys assert that they did marshal sufficiently for this Court. However, if this court finds more evidence necessary, the Bradleys include the following evidence, in addition to the evidence marshaled in their opening brief, in order to satisfy the marshalling requirement:

- Mr. Bradley testified that he thought the purpose of the meeting on September 12 was for the Markhams and their relatives to look at the property. [TT 280:21-22].
- Mr. Bradley testified that he did not recall Ms. Norton talking about certain financial documents that the Markhams wanted to go over. [TT 282 4-5].
- Mr. Bradley testified that he was not expecting the Markhams to come to the property on September 12 and that he was surprised when the Markhams came. [TT 282:25 through 283:3].
- Mr. Bradley testified that they did not discuss any financial documents at the meeting and that Mr. Markham did not try to tender any documents to him at their meeting on September 12. [TT 283:18-21].

V. The Trial Court Applied the Doctrine of Equitable Estoppel Incorrectly.

Waiver and equitable estoppel are closely linked legal remedies, neither of which is appropriate to the facts in this case. The issue of equitable estoppel was never raised before the trial court. In the trial court's Ruling and Finding of Facts it asserts of its own volition, that the Bradleys not only waived the right to enforce the September 12 deadline, but also that they were equitably estopped from enforcing the deadline. The trial court fails to provide any analysis as to why the Bradleys were equitably estopped. The Bradleys cannot be precluded from arguing in post-trial motions and on appeal that the trial court erred by stating the Bradleys were equitably estopped if the trial court brought the issue up sua sponte in its Rulings and Findings of Facts. However, if the issue was deemed to have been argued at trial court because equitable estoppel and waiver are such similar legal remedies, the preservation of one would necessarily preserve the other.

The Markhams suggest that the Bradley's burden is met as long as the issue was raised in such a way it "rises to a level of consciousness before the trial court" the Bradleys sufficiently met their burden in preserving the issue. [Br. Appellee 35]. The issue must have been raised sufficiently to be in the consciousness of the trial court if the trial court included it in the Rulings and Findings of Fact. The trial court had ample opportunity to examine the doctrine of equitable estoppel and the issue was properly preserved by the Bradleys.

Equitable estoppel is not applicable to the Bradleys because of Mr. Bradley's actions. Mr. Bradley did not review the documents on September 12. However, this action alone cannot be deemed as an action which is inconsistent with a later asserted right. Mr. Bradley did not refuse documents on September 13. He did not preclude the Markhams or Ms. Norton from faxing the financial information to him on September 13. Mr. Bradley did not verbally agree to an extended deadline, nor was there a writing which memorialized the supposed amendment to the contract. Despite Ms. Bradley being difficult to reach and Mr. Bradley refusing the documents on September 12, the documents and financial information still could have been delivered on September 13. The Bradleys do not rely on their own testimony, but rather the testimony of Ms. Norton. Ms. Norton testified, as explain *supra*, that she did not perform and deliver the required financial documents because of a mistake within her own office, not the actions or conduct of Mr. Bradley.

CONCLUSION

This Court should reverse the trial court's decision below and enter judgment as a matter of law in favor of the Bradleys.

Respectfully submitted this 11th day of September, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2007, I served two copies of the foregoing **REPLY BRIEF OF APPELLANTS JOHN J. BRADLEY and DARBY G. BRADLEY** by the following method on the persons listed below:

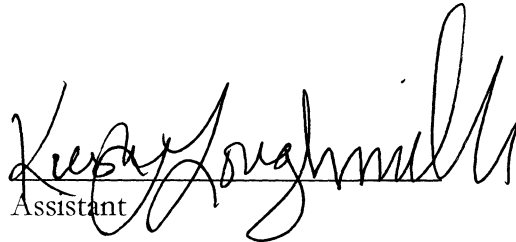
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