1995

Sandra L. Maxwell; Richard C. Burke; and Advance Business Equipment v. John T. Caine; Randall W. Richards : Brief of Appellee

Utah Court of Appeals

Carman E. Kipp; William W. Barrett; Kipp & Christian; Attorneys for Defendant/Appellees.
Jeffrey H. Hagen; Kevin D. Whatcott; Whatcott, Barrett & Hagen; Attorneys for Appellants.

IN THE UTAH COURT OF APPEALS

SANDRA L. MAXWELL; RICHARD C. BURKE; and ADVANCE BUSINESS EQUIPMENT a Utah Corporation; Plaintiffs/Appellants vs. JOHN T. CAINE; RANDALL W. RICHARDS; RICHARDS, CAINE & RICHARDS, a Utah professional partnership; RICHARDS, CAINE & ALLEN, a Utah professional partnership; the ESTATE OF JOHN ADAMS, by and through KENT M. KASTING, Personal Representative; and TAYLOR, ENNENGA, ADAMS & LOWE, a Utah professional corporation Defendants/Appellees	 Case No. 950564-CA Priority No. 15

BRIEF OF DEFENDANTS/APPELLEES ESTATE OF JOHN S. ADAMS BY AND THROUGH KENT M. KASTING, PERSONAL REPRESENTATIVE AND TAYLOR, ENNENGA, ADAMS & LOWE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY JUDGE TYRONE E. MEDLEY

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IN THE UTAH COURT OF APPEALS

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this case pursuant to U.C.A. §78-2A-3(2)(k) (Supp. 1995).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Plaintiff/Appellant, Sandra Maxwell ("Maxwell") has identified the issues presented to the court and although she has failed to cite to the pages in the trial court record where these issues are raised, the Defendants/Appellees, Estate of John S. Adams ("Adams Estate"), and Taylor, Ennenga, Adams & Lowe ("TEA&L") shall respond to those issues. Since this case resulted in the lower court granting summary judgment in favor of the Adams Estate and TEA&L, the standard of review for the appellate court is to review the trial court's rulings under a correction-of-error standard. *Aragon v. Clover Club Foods Company*, 857 P.2d 250, 252 (Utah App. 1993), *Rawlins v. Peterson*, 813 P.2d 1156 (Utah 1991).

STATEMENT OF THE CASE

Maxwell was the only named plaintiff in the lower court proceeding to assert claims against the Adams Estate and TEA&L. Those claims were based upon legal malpractice wherein Maxwell alleged that these defendants breached their contract and were negligent in representing her interests in an action filed against her and others on October 8, 1985 in the Third Judicial District Court, Salt Lake County designated as Civil No. C85-6773 ("Wade case"). This case involved real estate identified as the Pepperwood Property and Maxwell alleged that because of the breaches of contract and negligence of the Adams Estate and TEA&L,

she lost one-half of the property. In this case, Maxwell sought monetary damages against these defendants for the loss of this property. The Adams Estate and TEA&L filed a motion for summary judgment based upon the grounds that she could not establish by any competent evidence the damages she had claimed to have incurred or that she had in fact suffered any damages. The lower court granted summary judgment in an order dated April 20, 1995. (Trial court record pp. 863, 864, hereinafter citations to trial court record shall be with an R. and the page number).

STATEMENT OF FACTS

Since Maxwell in her "Facts" failed to support her factual statements by citations to the trial court record, the facts relevant to the issues presented on this appeal are provided below.

Maxwell's claims against the Adams Estate and TEA&L are set forth in the Amended Complaint under the eleventh and twelfth claims for relief and allege that these defendants breached their contract and were negligent in representing her interests in an action filed against her and others on October 8, 1985 in the Third Judicial District Court, Salt Lake County, designated as Civil No. C85-6773 ("Wade case"). This case involved real estate identified as the Pepperwood Property and Maxwell alleged that because of the breaches of contract and negligence of the Adams Estate and TEA&L, she lost one-half of the Pepperwood Property. In her prayer for relief under the eleventh and twelfth claims, she seeks monetary damages against the Adams Estate and TEA&L for the loss of the property. (R. 345,399-405,415,416 Addendum 1). Since Maxwell's claims are for legal malpractice relating to the alleged loss of the Pepperwood property, it is important to understand the history of the property

relating to ownership. On April 28, 1970, Advance Business Equipment entered into a uniform real estate contract with H.R. Fisher and Francis Fisher for the purchase of the Pepperwood property. Then Advance Business Equipment on February 27, 1976 assigned this uniform real estate contract to Sandra L. Maxwell. (R. 818-821 representing the deposition of Sandra Maxwell taken on October 21, 1994, pp. 29,30, hereinafter referred to as the "Maxwell deposition", assignment of contract, defendant's Exhibit no. 1 to the Maxwell deposition, deposition of Richard C. Burke taken on October 24 and 25, 1994, p. 60, hereinafter referred to as the "Burke deposition", Addendum 2.) Maxwell made payments to the Fishers for a period of time and then on May 20, 1993, Francis Fisher, by warranty deed, conveyed the Pepperwood property to Sandra L. Maxwell. (R. 822,823 which represents the Maxwell deposition, p. 37, and defendant's Exhibit no. 2 of the Maxwell deposition. Addendum 3.) At some time in 1987, Richard C. Burke, who was Maxwell's brother, formed a corporation by the name of Trendland, Inc. ("Trendland") because Maxwell wanted to put the property into a corporate entity for the purpose of future development. Then Maxwell conveyed the Pepperwood property to Trendland, Inc. by warranty deed on September 23, 1987. In return for this conveyance, Maxwell received a majority of the stock in Trendland which she still owns. (R. 824-829 which represents the Maxwell deposition pp. 46 and 47, the Burke deposition, pp. 111, 112 and 117, and defendant's Exhibit no. 3 to the Maxwell deposition which is the warranty deed. Addendum 4.) For purposes of this appeal, John S. Adams (Adams Estate) and the law firm of TEA&L began representing Maxwell in the Pepperwood action on August 12, 1988 as alleged in the amended complaint. (R. 372.)

Maxwell, in her brief under the Facts at page 5, paragraph 5, makes the following representation to the court in referencing Maxwell's conveyance of the Pepperwood property to Trendland in September of 1987, she claims that when the transfer was accomplished, "It was made with Trendland's full knowledge, with the understanding that Maxwell would continue to defend her ownership to the property." There is nothing in the trial court record supporting these facts.

SUMMARY OF ARGUMENT

Even though Maxwell raises four issues for review in her argument which will be addressed, it is the contention of the Adams Estate and TEA&L that with the conveyance of the Pepperwood property to Trendland on September 23, 1987, Maxwell's claim for the loss of one-half of the Pepperwood property is not available. She cannot claim the loss of real property she does not own, and therefore she has not incurred any damages as a result of the alleged conduct of these defendants.

ARGUMENT

POINT I

MAXWELL IS NOT ENTITLED TO ASSERT CLAIMS AGAINST THE ADAMS ESTATE AND TEA&L TO RECOVER THE PEPPERWOOD PROPERTY OR MONETARY DAMAGES UNDER THE WARRANTY DEED CONVEYING THE PROPERTY TO TRENDLAND, INC.

Maxwell contends under point I of her argument that she was obligated to file an action against the Adams Estate, TEA&L and others to recover the property or monetary damages because of the conveyance of the Pepperwood property to Trendland by warranty deed.

She cites as authority for this action U.C.A. §57-1-12 (1953). This section provides in pertinent part "...That the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever." Maxwell sets up her argument by referencing Patricia Wade's case ("Wade case") which was filed against Richard C. Burke, Advance Business Equipment and Maxwell in 1984 [sic] wherein she sought to have the Pepperwood property declared a part of the marital estate which related to her divorce from Mr. Burke. She then states that while this action was pending, the Pepperwood property was conveyed to Trendland by warranty deed in September of 1987. She represents that "the conveyance was made with the full knowledge of Trendland, with the understanding that Maxwell would continue to defend title to the property in the ongoing lawsuit in her name. The goal was to successfully defend title in Maxwell's name in order that the property be rightfully held by Trendland." (Maxwell brief at p. 8).

Although there is nothing in the Record to support these factual statements, her representation that she did not prevail in the Patricia Wade case is accurate. She claims that the loss incurred in this case caused her to be in breach of the warranty deed to Trendland and then states in her brief, "Maxwell brought the present action in order to recover damages she has suffered in breaching her contract with Trendland." (Maxwell brief at p. 8).

It is important to note Maxwell makes it clear her present claims against the Adams Estate and TEA&L are for the purpose of recovering damages she suffered and not any loss incurred by Trendland. In this case, she is not defending the title of the Pepperwood property on behalf of Trendland against any lawful claim which is required under §57-1-12. Maxwell admits to conveying the Pepperwood property to Trendland and also admits she

received as consideration for this conveyance 90 percent of Trendland's outstanding stock. There is no question that Trendland lost one-half of the Pepperwood property but not Maxwell. Furthermore, the Utah Supreme Court has made it clear that "...even though a shareholder owns all, or practically all, of the stock in a corporation, such a fact does not authorize him to sue as an individual for a wrong done by a third party to the corporation." *Norman v. Murray First Thrift and Loan Company*, 596 P.2d 1028, 1031, 1032 (Utah 1979). There is nothing in §57-1-12 which allows Maxwell to pursue her claims and obtain the relief she is seeking in her Amended Complaint.

POINT II

EVEN IF MAXWELL BREACHED HER CONTRACT WITH TRENDLAND AND IS POTENTIALLY LIABLE FOR THE MONETARY VALUE OF THE LOST PROPERTY, SHE IS STILL PRECLUDED FROM PURSUING THE CLAIMS AS ALLEGED IN HER AMENDED COMPLAINT.

Maxwell argues under Point II of her brief that she owes Trendland the value of the property lost and this is what she is seeking in the present case. However, she totally ignores the criteria necessary to prove her claims against the Adams Estate and TEA&L. The elements of an attorney malpractice action requires that the plaintiff prove, "(1) an attorney/client relationship; (2) a duty of the attorney to the client; (3) a breach of that duty; and (4) damages suffered by the client proximately caused by the attorney's breach of duty. *Harline v. Barker*, 854 P.2d 595, 598 (Utah App. 1993). See also *Williams v. Barber*, 765 P.2d 887 (Utah 1988). The plaintiff must establish some competent evidence to support each of these elements. In this case, the missing element in the claims asserted by Maxwell against the Adams Estate and TEA&L is that she cannot establish by any competent evidence the damages she claims to have

incurred. There is no evidence in the trial court record that Trendland has made a claim against her for the value of the property lost and therefore she has not suffered any damages. However, Maxwell argues she is entitled to recover for an anticipated future loss in that Trendland might assert a claim some time in the future. As support for this contention, Maxwell cites the case of *Walton v. City of Bozeman*, 588 P.2d 518 (Mont. 1978). In this case, the city of Bozeman, because of its expanding city limits, closed a ditch which provided water to the property of the plaintiff, Roy Walton. In closing the ditch, the city installed a new diversion ditch with a culvert placed under a road which would bring the water to Mr. Walton's land. There was a diversion box with a cement structure with an iron grating and the court found that the construction of the diversion box at times interfered with the flow of Walton's water preventing it from reaching his land. In addition, the city had installed a storm sewer under another street which discharged its drainage waters through a culvert and it would eventually come upon Walton's land and, at times, cause flooding and pollution from the water. Based upon the flooding and damage to his land, Mr. Walton filed suit against the city. The court found that the city was responsible for the flooding and awarded Mr. Walton monetary damages for his losses. In addition, the court awarded Mr. Walton monetary damages for future losses until the flooding and pollution problems were remedied by the city. In upholding this award for future damages, the Supreme Court of Montana stated the following:

> It was proper for the court to award a reasonable amount of damages for the continuing interference with the flow of Walton's irrigation water, and the continuing flooding and discharge of polluted waters upon his land.
>
> "Prospective damages" are those which are reasonably certain to follow the state of facts on which plaintiff's suit is based; such damages have not yet accrued at the time of trial, but in the nature

> things must certainly or most probably result from the state of facts found to be existing at the time of trial. (Citation omitted) *Walton* at 522.

In this case, the court concluded that the facts supported an award of prospective damages based upon the existing facts that the Walton property would continue to have flooding and related problems until the city fixed the ditches which were the cause. Maxwell's claims are distinguishable from those of Mr. Walton. He established actual losses and that these losses would occur in the future as long as the flooding and related problems continued. Maxwell cannot establish any loss at this time, and based upon the factual allegations contained in her Amended Complaint against the Adams Estate and TEA&L and the existing facts, she will never suffer a loss of the Pepperwood property. The loss incurred is Trendland's, and it has not taken any action against Maxwell under the warranty deed. Maxwell's claim for future damages are purely speculative which are not allowed under Utah law. *Bastian v. King*, 661 P.2d 953 (Utah 1983).

POINT III

UNDER THE FACTS ALLEGED IN THE AMENDED COMPLAINT, TRENDLAND, INC. IS NOT THE REAL PARTY IN INTEREST AND THE SUBSTITUTION OF TRENDLAND, INC. FOR MAXWELL IS NOT APPROPRIATE

Maxwell's attempt to utilize Rule 17(a) of the Utah Rules of Civil Procedure to substitute Trendland, Inc. in her place as plaintiff cannot be done in this case. Maxwell's claims against the Adams Estate and TEA&L are based upon alleged attorney malpractice. If Trendland was substituted for Maxwell to pursue the attorney malpractice claims, those claims would fail because Trendland cannot establish the necessary elements as set forth in *Harline v. Barker*, 854

P.2d 595 (Utah App. 1993). There is no evidence in the record that John S. Adams or the law firm of Taylor, Ennenga, Adams & Lowe ever had an attorney/client relationship with Trendland, Inc., and therefore, a substitution under Rule 17(a) would result in a dismissal of the pending legal malpractice claims.

POINT IV

DEFENDANTS ARE NOT ESTOPPED FROM CLAIMING MAXWELL CANNOT ESTABLISH BY COMPETENT EVIDENCE THE DAMAGE ELEMENT OF HER LEGAL MALPRACTICE CLAIMS

Maxwell argues under Point IV of her brief that the Adams Estate and TEA&L cannot raise the issue of her ability to prove damages as a bar to her legal malpractice claims based upon a theory of estoppel. However, she fails to acknowledge that it was her own conduct that resulted in her inability to prove damages in this case. She conveyed the Pepperwood property to Trendland in exchange for 90 percent of its stock in September 1987, almost one year before John S. Adams and TEA&L began representing her in the Wade case. She benefited from this transaction and now is attempting to obtain monetary compensation for the loss of property she does not own. In fact, she did not own the property at the time the court in the Wade case awarded one-half of it to Patricia Wade. Trendland incurred the loss and if there is a claim to be made on any theory of liability against the Adams estate and TEA&L, it's Trendland's. Furthermore, Trendland may be barred from asserting any claims based upon the applicable statutes of limitations. See Utah Code Ann. §78-12-6 (1953).

Maxwell cannot establish the three elements of estoppel which are set forth in *Ceco v. Concrete Specialists, Inc.*, 772 P.2d 967, 969, 970 (Utah 1989) wherein the Utah Supreme Court stated:

> Estoppel is an equitable defense that requires proof of three elements: (i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result form allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

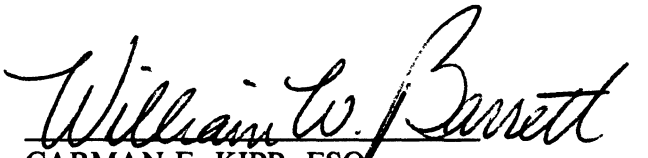
The first two elements are not relevant because Maxwell created her own problem in this case when she conveyed the Pepperwood property to Trendland. In any event, Maxwell cannot prove the third element regarding injury. She argues that she would suffer the injury of losing her cause of action for legal malpractice if the Adams estate and TEA&L are allowed to contradict their prior actions by claiming she has no damages. However, the facts before this court establish that she never had a legal malpractice claim against the Adams estate and TEA&L because she lacked the element of damages. Therefore, her injury cannot be the loss of her cause of action for legal malpractice, and she has suffered no other damage.

CONCLUSION

Wherefore, based upon the foregoing, the Adams estate and TEA&L respectfully urge the court to affirm the summary judgment granted by the lower court.

DATED THIS 29 day of November, 1995.

KIPP AND CHRISTIAN, P.C.



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MAILING CERTIFICATE

I HEREBY CERTIFY that on the 29 day of November, 1995, I caused two true and correct copies of the foregoing Brief of Defendants/Appellees, Estate of John S. Adams by and through Kent M. Kasting, Personal Representative and Taylor, Ennenga, Adams & Lowe, to be mailed, postage prepaid, to the following:

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ADAMS\BRIEF

ADDENDA

ADDENDUM 1

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

SANDRA L. MAXWELL; RICHARD C. BURKE; and ADVANCE BUSINESS EQUIPMENT, a Utah corporation, Plaintiffs, vs. JOHN T. CAINE, RANDALL W. RICHARDS, RICHARDS, CAINE & RICHARDS, a Utah professional partnership; RICHARDS, CAINE & ALLEN, a Utah professional partnership; the ESTATE OF JOHN S. ADAMS, by and through KENT M. KASTING, Personal Representative; and TAYLOR, ENNENGA, ADAMS & LOWE, a Utah professional corporation, Defendants.	**AMENDED COMPLAINT** **(JURY TRIAL DEMANDED)** Civil No. 920901881 CN Judge Medley

Plaintiffs complain of defendants, and, demanding trial by jury, seek relief as follows:

1988) conclusively established that motions for reconsideration were appropriate in the circumstances;

(e) Entered into a Stipulation agreeing to prejudicially shorten the time for the August 15, 1988 hearing on Wade's Motion for Entry of Judgment; and

(f) Failed to ensure that Maxwell's new counsel timely filed a Notice of Appeal of the Court's September 7, 1988 Order and Judgment.

259. As a direct and proximate result of Richards' and RC&A's negligence, Maxwell incurred substantial damage, including, but not limited to, her loss of one-half of the Pepperwood Property, having a value of approximately $600,000.

260. Maxwell is entitled to recover from Richards and RC&A all damages sustained by Maxwell as a direct and proximate result of Richards' and RC&A's negligence, including, but not limited to, the damages set forth in paragraph 259 above.

XIV

ELEVENTH CLAIM FOR RELIEF

(AGAINST ADAMS AND TEA&L)

(Breach of Contract/Pepperwood Action)

For the Eleventh Claim for Relief, Maxwell complains against defendants Adams' Estate and TEA&L, and alleges as follows:

261. Maxwell realleges and incorporates herein by reference paragraphs 1 through 260 set forth hereinabove.

262. Maxwell entered into a valid contract whereby Adams and TEA&L agreed to provide legal services to Maxwell in exchange for a fee.

263. Maxwell's contract with Adams and TEA&L, which included an implied covenant of competence, diligence and due care, required Adams and TEA&L:

(a) To be adequately prepared, upon accepting representation of Maxwell, to defend Maxwell against all motions brought against her;

(b) To zealously defend Maxwell's interests in all hearings where relief was sought against Maxwell;

(c) To timely file notices of appeal of all final orders adversely affecting Maxwell's interests;

(d) To request the Court to reconsider its October 21, 1988 Order on the grounds that the previously decided opinion of the Court of Appeals in Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 44-45 (Utah App. 1988) conclusively established that motions for reconsideration were appropriate in the circumstances;

(e) To file reply memoranda supporting motions brought by Adams and TEA&L on Maxwell's behalf; and

(f) To give Maxwell proper legal advise regarding her failure to appeal final orders.

264. In breach of their contract with Maxwell in the implied covenant of competence, diligence and due care, Adams and TEA&L inexcusably:

(a) Failed to request a continuance of the August 15, 1988 hearing on Wade's Motion for Entry of Judgment;

(b) Failed to make any argument whatsoever on Maxwell's behalf at the August 15, 1988 hearing on Wade's Motion for Entry of Judgment;

(c) Failed to file timely notices of appeal of (1) the Court's September 7, 1988 Order and Judgment; (2) the Court's October 21, 1988 Order; and (3) the Court's February 17, 1989 Order;

(d) Failed to request the Court to reconsider its October 21, 1988 Order on the grounds that the previously decided opinion of the Court of Appeals in Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 44-45 (Utah App. 1988) conclusively established that motions for reconsideration were appropriate in the circumstances;

(e) Failed to file any reply memorandum with respect to Maxwell's December 28, 1988 Motion for Relief from the September 7, 1988 Order and Judgment; and

(f) Incorrectly advised Maxwell through Burke that Burke's appeal of the Court's December 2, 1988 Order would adequately protect Maxwell from the effects of the Court's September 7, 1988 and October 21, 1988 Orders.

265. As a direct consequence of Adams' and TEA&L's breaches of contract, Maxwell lost one-half of the Pepperwood Property.

266. By reason of Adams' and TEA&L's breaches of contract, Maxwell has suffered damages resulting from those defendants' breach in an amount in excess of $600,000, plus prejudgment interest as provided by law, the precise amount of which will be established by proof at trial.

XV

TWELFTH CLAIM FOR RELIEF

(AGAINST ADAMS AND TEA&L)

(Negligence/Pepperwood Action)

For the Twelfth Claim for Relief, Maxwell complains against defendants Adams' Estate and TEA&L, and alleges as follows:

267. Maxwell realleges and incorporates herein by reference paragraphs 1 through 266 set forth hereinabove.

268. As Maxwell's attorneys, Adams and TEA&L owed Maxwell a duty to represent Maxwell's interest with competence, diligence and due care and to possess the legal skills and knowledge common to

members of their profession, which included among other things, the duties

(a) To be adequately prepared, upon accepting representation of Maxwell, to defend Maxwell against all motions brought against her;

(b) To zealously defend Maxwell's interests in all hearings where relief was sought against Maxwell;

(c) To timely file notices of appeal of all final orders adversely affecting Maxwell's interests;

(d) To request the Court to reconsider its October 21, 1988 Order on the grounds that the previously decided opinion of the Court of Appeals in Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 44-45 (Utah App. 1988) conclusively established that motions for reconsideration were appropriate in the circumstances;

(e) To file reply memoranda supporting motions brought by Adams and TEA&L on Maxwell's behalf; and

(f) To give Maxwell proper legal advise regarding her failure to appeal final orders.

269. In breach of the duties set forth above, Adams and TEA&L, among other things, negligently

(a) Failed to request a continuance of the August 15, 1988 hearing on Wade's Motion for Entry of Judgment;

(b) Failed to make any argument whatsoever on Maxwell's behalf at the August 15, 1988 hearing on Wade's Motion for Entry of Judgment;

(c) Failed to file timely notices of appeal of (1) the Court's September 7, 1988 Order and Judgment; (2) the Court's October 21, 1988 Order; and (3) the Court's February 17, 1989 Order;

(d) Failed to request the Court to reconsider its October 21, 1988 Order on the grounds that the previously decided opinion of the Court of Appeals in Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 44-45 (Utah App. 1988) conclusively established that motions for reconsideration were appropriate in the circumstances;

(e) Failed to file any reply memorandum with respect to Maxwell's December 28, 1988 Motion for Relief from the September 7, 1988 Order and Judgment; and

(f) Incorrectly advised Maxwell through Burke that Burke's appeal of the Court's December 2, 1988 Order would adequately protect Maxwell from the effects of the Court's September 7, 1988 and October 21, 1988 Orders.

270. As a direct and proximate result of Adams' and TEA&L's negligence, Maxwell incurred substantial damage, including, but not

limited to, her loss of one-half of the Pepperwood Property, having a value of approximately $600,000.

271. Maxwell is entitled to recover from Adams and TEA&L all damages sustained by Maxwell as a direct and proximate result of Adams' and TEA&L's negligence, including, but not limited to, the damages set forth in paragraph 270 above.

XVI

THIRTEENTH CLAIM FOR RELIEF

(AGAINST CAINE, RC&R AND RC&A)

(Breach of Contract/Child Support Judgments)

For the Thirteenth Claim for Relief Burke complains against defendants Caine, RC&R and RC&A, and alleges as follows:

272. Burke realleges and incorporates herein by reference paragraphs 1 through 271 as set forth hereinabove.

273. Burke entered into a valid contract whereby Caine, RC&R and RC&A agreed to provide legal services to Burke in exchange for a fee.

274. Burke's contract with Caine, RC&R and RC&A, which included an implied covenant of competence, diligence and due care, required Caine, RC&R and RC&A, among other things,:

(a) To prepare the findings of fact and conclusions of law supporting the Decree in accordance with the court's January 5, 1984 Order in the Divorce Action, stating that

3. That Maxwell recover from those defendants her cost of suit.

4. That Maxwell have such other and further relief as the Court deems appropriate.

WHEREFORE, under the Eleventh Claim for Relief, Maxwell prays for judgment against Defendants Adams and TEA&L as follows:

1. That those defendants be adjudicated as having breached their contract with Maxwell and are, therefore, liable to Maxwell.

2. That Maxwell have and recover from those defendants judgment for all damages sustained by Maxwell at least in the amount of $600,000, plus prejudgment interest.

3. For an award of incidental and consequential damages suffered by Maxwell, including an award of Maxwell's reasonable attorneys' fees incurred in this matter.

4. That Maxwell recover from those defendants her cost of suit.

5. That Maxwell have such other and further relief as the Court deems appropriate.

WHEREFORE, under the Twelfth Claim for Relief, Maxwell prays for judgment against Defendants Adams and TEA&L as follows:

1. That defendants Adams and TEA&L be adjudicated as having negligently represented Maxwell.

2. That Maxwell have and recover from those defendants judgment for all damages sustained by Maxwell at least in the amount of $600,000, plus prejudgment interest.

3. That Maxwell recover from those defendants her cost of suit.

4. That Maxwell have such other and further relief as the Court deems appropriate.

WHEREFORE, under the Thirteenth Claim for Relief, Burke prays for judgment against Defendants Caine, RC&R and RC&A as follows:

1. That those defendants be adjudicated as having breached their contract with Burke and are, therefore, liable to Burke.

2. That Burke have and recover from those defendants judgment for all damages sustained by Burke at least in the amount of $48,000, plus prejudgment interest.

3. For an award of incidental and consequential damages suffered by Burke, including an award of Burke's reasonable attorneys' fees incurred in this matter.

4. That Burke recover from those defendants his costs of suit.

5. That Burke have such other and further relief as the Court deems appropriate.

WHEREFORE, under the Fourteenth Claim for Relief, Burke prays for judgment against Defendants Caine, RC&R and RC&A as follows:

ADDENDUM 2

MAXWELL DEPOSITION
Oct. 12, 1994

Q What was the next piece of property -- okay, we've now talked about your home that you still live in. What was the next piece of real property that you've either purchased or received?

A That would be the large piece, pepperwood property.

MR. KAY: Would you mark that.

(Whereupon, Defendant's Exhibit No. 1 was marked for identification.)

Q (BY MR. KAY) I'm going to hand you, Mrs. Maxwell, Defendant's Exhibit 1 which is entitled an Assignment of Contract that was given to me by your attorney this morning. Is that your understanding, an Assignment of Contract relating to what you've described as the Pepperwood property?

A Yes.

Q What was the date that you received an interest in the Pepperwood property?

MR. HAGEN: You can look at what it says on there if you want.

THE WITNESS: 1970.

Q (BY MR. KAY) Well, I believe does it say that you received it February --

A I'm sorry. I'm looking down here.

Q I think that's the original Uniform Real Estate Contract. Is it your understanding it was approximately February 27th, 1976?

A Yeah.

MR. KIPP: What are we looking at now?

MR. KAY: We're looking at the pepperwood Assignment of Contract that's been marked as Exhibit 1 in the documents they gave us today. It's that document that you have in your hand.

MR. KIPP: Thank you.

Q (BY MR. KAY) How was it that you received this Pepperwood property that's been described in Exhibit 1 in February of 1976?

A I'm sorry, what do you mean?

Q Well, prior to February 27th, 1976, I understand that you didn't have the Pepperwood property; is that correct?

A Yes, uh-huh.

Q Who owned the Pepperwood property before February 27, 1976?

A Advance Business Equipment.

Q And Advance Business Equipment is a company that your brother, Richard Burke owns; is

THIS AGREEMENT, made in the City of Ogden, State of Utah on the 27th day of February, 19 76 by and between Advance Business Equipment a corporation of S.L. Utah hereinafter referred to as the assignors, and Sandra L. Maxwell a woman hereinafter referred to as the assignees,

WITNESSETH:

WHEREAS, under date of April 28, 19 70, H. R. Fisher and Frances Fisher his wife as sellers, entered into a Uniform Real Estate Contract with Advance Business Equipment a corporation of Utah as buyers, of Salt Lake City Utah, which contract is delivered herewith, wherein and whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, conditions, and provisions therein set forth, all that certain land, with the buildings and improvements thereon, erected, situate, lying and being in the County of Salt Lake State of Utah, and more particularly described as follows:

The South 396 feet of the Northeast quarter of the Northwest quarter of the Northeast quarter of Section 22: the South 396 feet of the East one-half of the Northwest quarter of the Northwest quarter of the Northeast quarter of Section 22: the North 264 feet of the Southeast quarter of the Northwest quarter of the Northeast quarter of Section 22: and the North 264 feet of the East one-half of the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 22. Township 3 South, Range 1 East, SLB&M.

SUBJECT to easements, restrictions and rights of way appearing of record, or enforceable in law or equity.

to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the assignees desire to acquire from the assignors all of the right, title and interest of the assignors in and to the said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their right, title and interest in and to the aforesaid Uniform Real Estate Contract of April 28, 19 70, concerning the above described property.

2. That to induce the assignees to pay the said sum of money and to accept the said contract, the assignors hereby represent to the assignees as follows:

   a. That the assignors have duly performed all the conditions of the said contract.

   b. That the contract is now in full force and effect and that the unpaid balance of said contract is $ 15,384.60 with interest paid to the 27th day of February 1976

3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:

   a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.

   b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day and year first above written.

Witness

(Notary Public)
Residing at Ogden, Utah.
My commission Expires: My 21 1979

Witness

Advance Business Equipment
By Sandra L. Maxwell
Assignors

x Signature illegible

Assignees

DEFENDANT'S EXHIBIT #1 Maxwell

BURKE DEPOSITION
Oct. 24, 1994

the '70's, or not?

A I believe it was in the '80's.

Q So you bought the Pepperwood property from the Fishers and paid payments for a few years; is that correct?

A That's correct.

Q And then in 1976, February 27, 1976, you assigned the contract with the Fishers to Sandra Maxwell; is that correct?

A That's correct.

Q Now, why did you assign the contract between Advance Business Equipment and the Fishers to Sandra Maxwell?

A Well, for two reasons, basically. The company was in a little bit of a financial problem at that period of time and I didn't feel that the company would have the money to make the next payment to the Fishers, and we didn't want to lose the property entirely, so --

Q Did you have a concern that if the company still had the property, that creditors could reach it?

A Well, it wouldn't be creditors. It would just be that if we couldn't make the payments, that Bud Fisher would probably take the

ADDENDUM 3

MAXWELL DEPOSITION
Oct. 21, 1994

A To Mrs. Fisher?

Q Yes.

A Yes.

Q How many years did you make payments?

A Oh, what, 10 years possibly. I can't remember exactly.

Q After you made payments and paid off the contract, did you receive a Warranty Deed from the Fishers?

A Yes.

Q And you didn't produce any Warranty Deed today; is that correct?

A Apparently not.

(Whereupon, Defendant's Exhibit No. 2 was marked for identification.)

Q (BY MR. KAY) I'm going to hand you what's been marked as Exhibit 2 to your deposition, Mrs. Maxwell, and this is entitled Warranty Deed from Frances Fisher to Sandra Maxwell dated May 20, 1983. Is Exhibit 2 the Warranty Deed that you received from Frances Fisher after you had paid the contract on Pepperwood?

A It looks to be that.

Q Does this refresh your memory that you

Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to _____ Address _____

4404466

WARRANTY DEED

Frances Fisher, Wife of H. R. Fisher (deceased) grantor
of Salt Lake City County of Salt Lake State of Utah, hereby
CONVEY and WARRANT to

Sandra L. Maxwell, a woman grantee
of Ogden, County of Weber, State of Utah for the sum of
Ten dollars and other good and valuable consideration DOLLARS

the following described tract of land in County,
State of Utah:

The South 396 feet of the Northeast quarter of the Northwest quarter of the Northeast quarter of Section 22; the South 396 feet of the East one-half of the Northwest quarter of the Northwest quarter of the Northeast quarter of Section 22; the North 264 feet of the Southeast quarter of the Northwest quarter of the Northeast quarter of Section 22; and the North 264 feet of the East one-half of the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 22, Township 3 South, Range 1 East, SLB&M

SUBJECT to easements, restrictions and rights of way appearing of record, or enforceable in law or equity.

WITNESS, the hand of said grantor, this 20th day of
May , A.D. 1983

Signed in the Presence of Frances Fisher

STATE OF UTAH,
County of Salt Lake } ss.

On the 20th day of May ,A.D. 19 83
personally appeared before me
the signer of the within instrument, who duly acknowledged to me that she executed the
same.

Notary Public.

My commission expires 5-5-84 Residing in Salt Lake

SOUVEST OF WESTERN STATES TITLE COMPANY, 370 EAST 5TH SO. ST., S.L.C., UTAH

5879 1501

DEFENDANT'S EXHIBIT #2 Maxwell

00009

ADDENDUM 4

MAXWELL DEPOSITION
Oct. 21, 1994

No. 3 was marked for identification.)

Q (BY MR. KAY) I'm going to hand you what's been marked as Exhibit 3 to your deposition. Can you tell me what that is, Mrs. Maxwell? Do you know what Exhibit 3 is?

A A Warranty Deed.

Q At some point after May of 1983, did you transfer your interest in the Pepperwood property to a corporation called Trendland, Inc.?

A Yes.

Q And was that approximately September 23rd, 1987?

A Yes, uh-huh.

Q Did you sign this deed and have it notarized on September 23rd, 1987?

A Yes.

Q That is your signature under the date?

A Yes.

Q Why did you transfer this property through Exhibit 3, the Warranty Deed to Trendland, Inc. in September of 1987?

A Well, we had hopes of developing the piece of property.

Q Who is we?

A Myself and the -- myself principally.

MR. KIPP: I'm not able to hear you.

THE WITNESS: I'm sorry.

MR. HAGEN: Do you want to repeat.

Q (BY MR. KAY) Let me ask the question again. Why did you transfer the Pepperwood property to Trendland, Inc. in September of 1987?

A We had hopes of developing the piece of property.

Q And when you say we, are you only referring to yourself or someone else?

A Well, primarily, at first myself.

Q What was Trendland, Inc.?

A It was a corporation.

Q Is this a corporation that you were an officer in?

A No. I had primarily most of the -- the majority -- I shouldn't say most, I should say the majority of the stock in Trendland.

Q Were you an officer or director in Trendland at the time that you conveyed the Pepperwood property to Trendland in September of 1987?

A I don't believe so, no.

Q How much money were you paid by

Burke Deposition
Oct. 24, 1994

A Yes, he did.

Q Okay, when?

A Well, I don't know the exact time that he first started to represent me. I don't know. I thought it was in 1978 sometime.

Q Do you have any explanation why your wife's attorney sent you a Motion for Sanctions on December 14, 1978 instead of sending it to John Caine?

A I don't know the answer to that.

Q We were talking about the Pepperwood case before lunch, Mr. Burke, and I believe you said that Trendland paid the property taxes on Pepperwood; is that correct?

A Trendland paid the rollback taxes on the Pepperwood property.

Q Of approximately $30,000?

A Approximately. I don't know the exact amount.

Q How did the Trendland Corporation come about? Whose idea was it?

A Well, it was Sandra Maxwell's. She wanted the property into a corporation which would take some of the pressure off her, and she also wanted to have it in a vehicle for future

development. So it was because of that that I initially started Trendland and we had the property put into Trendland.

Q Can you tell me how putting the pepperwood property in a corporation was going to take pressure off of Sandra Maxwell?

A Well, she wouldn't directly own the property any more, not directly. She would indirectly because she was such a large stockholder, she could receive stock from the corporation from putting the property into it.

Q What did Sandra Maxwell get for putting the Pepperwood property into the Trendland Corporation?

A Shares of stock.

Q And what were the shares of stock of Trendland worth when she put the property into it?

A Well, the shares of stock would have to be set up as to the value or were set up as to the value of the property at the time that she put the property in, and I don't recall what that value was at that time at all.

Q Okay, the incorporators of Trendland, Inc. were Richard Burke, Maury Burke and Pamela Reichert; is that correct?

a director?

MR. HAGEN: I'm going to object, foundation. I don't think he can testify as to what his sister knows.

THE WITNESS: I really can't. I don't know that.

Q (BY MR. KAY) Was your sister the only shareholder of Trendland, Inc.?

A No. The other people that came in as officers and directors were given shares of stock in the corporation.

Q How many shares of stock was your sister given when Trendland, Inc. was formed?

A I believe it was 50,000.

Q How many shares were you given?

A I wasn't given any.

Q How many shares were any of the other officers or directors given?

A At the time the corporation was formed, there was none given out.

Q At any time after the corporation was formed, were any of the officers or directors given shares in Trendland, Inc.?

A Yes, they were.

Q Were you given any?

Recorded at Request of Sandra L. Maxwell

at ..... M. Fee Paid $.....

by ..... Dep. Book ..... Page ..... Ref.: .....

Mail tax notice to ..... Address .....

4529010

WARRANTY DEED

SANDRA L. MAXWELL, A WOMAN grantor

of Ogden, County of County of Weber State of Utah, hereby

CONVEY and WARRANT to

TRENDLAND INC.

grantee

of SALT LAKE CITY County SALT LAKE State of Utah

for the sum of Ten dollars and other good and valuable consideration DOLLARS

the following described tract of land in County,

State of Utah, to-wit:

The South 396 feet of the Northeast quarter of the Northwest quarter of the Northeast quarter of Section 22; the South 396 feet of the East one-half of the Northwest quarter of the Northwest quarter of the Northeast quarter of Section 22; the North 264 feet of the Southeast quarter of the Northwest quarter of the Northeast quarter of Section 22; and North 264 feet of the East one-half of the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 22, Township 3 South, Range 1 East. SLB&M

SUBJECT TO easements, restrictions and rights of way appearing of record, or enforceable in law or equity.

1.00

4529010
23 SEPTEMBER 87 04:41 PM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
TRENDLAND INC.
P.O. BOX 6455 SLC, UT 84106
REC BY: REBECCA GRAY , DEPUTY

WITNESS the hand of said grantor, this 23rd day of Sept A. D. 19 87

Signed in the presence of Sandra L Maxwell

STATE OF UTAH
COUNTY OF Weber } ss.

On the 23rd day of September A. D. 19 87 personally appeared before me Sandra L. Maxwell the signer of the within instrument who duly acknowledged to me that he executed the same.

Notary Public

My Commission Expires:

Feb 10, 1989

Residing at St. Benedict's Hospital Ogden, Utah

5965 PAGE 1883

DEFENDANT'S EXHIBIT #3 Maxwell

100679