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Joseph L. Gasser, Jr. and Freda N. Gasser v. David M> Horne and Jeanne M. Horne : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPH L. GASSER, JR. and
FREDA N. GASSER,

Plaintiffs and
Appellants,

vs.

DAVID M. HORNE and
JEANNE M. HORNE,

Defendants and
Respondents.

Civil No. 14513

APPELLANTS' BRIEF

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY,
THE HONORABLE ERNEST F. BALDWIN,
PRESIDING

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FILED

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPH S. GASSER, JR. and)	
FREDA N. GASSER,)	
)	
Plaintiffs and)	<u>APPELLANTS' BRIEF</u>
Appellants,)	
)	
v.)	Civil No. 14513
)	
DAVID M. HORNE and)	
JEANNE M. HORNE,)	
)	
Defendants and)	
Respondents.)	
)	

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NATURE OF THE CASE

Appellants (Plaintiffs) seek to recover their rights in real property and declare null and void, for lack of consideration and duress, an agreement between them and Respondents (Defendants) by which Respondents claim an interest in the property.

DISPOSITION IN THE LOWER COURT

The District court in and for Salt Lake County, Judge Ernest F. Baldwin sitting without a jury, rendered judgment for Respondents (Defendants) and awarded them the disputed real property interests, subject to certain encumbrances.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's judgment together with certain findings and conclusions on which the judgment is based, with the resulting effect that Respondents shall have no interest in the subject real property. In the alternative, Appellants seek a remand and a new trial before a jury, a right erroneously denied by the lower court.

STATEMENT OF FACTS

For ease of reference, citations to the trial transcript will refer to the transcript page numbers as "Tr. ____". Other parts of the record will be cited "R. ____".

Prior to 1973, Appellants (Plaintiffs) JOSEPH S. GASSER and FRED A. N. GASSER, his wife, (for convenience sometimes referred

to collectively herein as the "GASSERS") owned 42.5% of a mobile home park in Layton, Davis County, Utah, known as "Hillgate Terrace". The remaining interests were owned by a Smith Family (15%) and Dr. Skankey (42.5%). The interest was subject to a mortgage in the amount of \$139,000.00 to Dr. Skankey as security for other obligations, and an additional mortgage of \$225,000.00 to a group headed by Dr. Skankey (referred to in the record as the "Skankey group") as security for further indebtedness of the GASSERS. The \$225,000.00 was secured as well by a mortgage on an apartment house owned by the GASSERS in Missoula, Montana along with other securities. (See Tr. 29, 104 and 122 and Ex. 18-D). The Hillgate Terrace was subject also to a first mortgage to another financial institution, not in issue here. (Tr. 106).

In order to obtain funds with which to pay the Skankey group and Dr. Skankey, to purchase the interests of Smith and Skankey in Hillgate Terrace, and to make improvements thereon, Mr. GASSER began negotiating in early 1973 for a loan of at least \$1 million against Hillgate Terrace. His preliminary investigations indicated that the money supply was tight and the loan may have to carry an additional guarantor. Mr. GASSER approached Defendant DAVID M. HORNE who indicated a willingness to guaranty or co-sign the loan. GASSER and HORNE made a joint application to Prudential Federal Savings (Ex. 14-D) which was rejected, and thereafter made application to American Savings & Loan Association for a loan, concerning

which the additional relevant events occurred. Subsequently, HORNE demanded 50% interest in Hillgate Terrace as a condition of co-signing on the note and mortgage. A draft agreement was prepared by Joseph L. Henriod, Esq. in early April 1973 (Ex. 4-P) incorporating the terms agreed to by HORNE and GASSER. In substance, if GASSER could complete the loan in 60 days without the necessity of HORNE's signature, HORNE would have no interest in the property; otherwise, HORNE would co-sign the note and mortgage and receive a 50% interest.

During the time HORNE and GASSER were negotiating with American Savings & Loan, and GASSER was seeking means of concluding a loan without HORNE's signature, a foreclosure action was underway in Montana by which Mr. Henriod, or Montana counsel at his direction, sought to collect funds due Dr. Skankey or the Skankey Group. (Tr. 287). Mr. Henriod represented the Skankey group. Both previously and subsequently, he represented DAVID M. HORNE on other matters. (Tr. 319). Although he claimed not to represent HORNE in the negotiations with GASSER here in dispute, he drafted and revised the agreements in question and discussed all matters pertaining to HORNE's interests either with GASSER directly or with GASSER's counsel, James L. Baker, Jr. (Tr. 290 and 301; Ex. 17-D).

GASSER and HORNE subsequently renegotiated their terms after American Savings & Loan committed a loan which might be resold

on a 90% participation to Equitable Savings & Loan in Portland, Oregon. In substance, HORNE agreed to permit the GASSERS to have the mortgage and the Hillgate Terrace if the loan could be sold to Equitable with only the GASSERS signing on the loan. Otherwise HORNE demanded his 50% of Hillgate Terrace. HORNE would not be obligated to pay any other consideration for that 50% interest.

During the final week of concluding the American Savings & Loan deal beginning June 25, 1973, the GASSERS objected to sign the HORNE Agreement which had been redrafted in several forms by Mr. Henriod (Exs. 5-P, 6-P and 22-D) because they did not like the limitations which required selling the loan to Equitable within 30 days as the only condition which would render HORNE's signature unnecessary. Mr. Henriod advised the GASSERS that if they did not sign the agreement, he would complete his foreclosure for the Skankey group. (Tr. 336). The GASSERS felt they would "lose everything" by such action, (Tr. 174) and finally, even against the advice of their own counsel (Tr. 226), they executed the HORNE agreement. That agreement is the principal issue in this appeal, together with the circumstances inducing execution of the same.

On or about June 29, 1973, the loan with American Savings was closed with a special escrow set up through Ralph Marsh, Esq. of Backman, Backman & Clark. Out of the proceeds of the loan as actually closed, the Skankey Group was paid approximately \$401,600 (Ex. 7-P). In a simultaneous transaction, the Montana properties were sold and Dr. Skankey and the Skankey Group paid all monies

a note and trust deed with related documents signed only by the GASSERS, the other having a note and trust deed signed by both the GASSERS and the HORNES. (Tr. 205). The trust deed signed by the GASSERS was actually recorded on July 2, 1973 and the documents signed by the HORNES are still in escrow. Thus, under the operative documents, the HORNES never did assume liability on any note or mortgage. Equitable declined to purchase the loan after it was closed by American Savings, but as of January 22, 1974, the loan was sold on a 75% participation basis to Far West Savings & Loan, Portland, Oregon. American Savings had earlier indicated a willingness to grant the GASSERS a loan without the HORNES, at a higher interest rate (Tr. 124,239), but "backed down" from that offer prior to June 29, 1973 when Mr. Henriod and Mr. HORNE made known their demands for the 50% interest for HORNE and made it appear "too messy" for American Savings to deal further with GASSERS on another basis. (Tr. 242).

By reason of the duress felt by the GASSERS as well as the apparent lack of consideration in the HORNE Agreement, Mr. GASSER initiated this lawsuit to prevent the escrow agent from recording the deed which would have conveyed the 50% interest to the HORNES, and to determine further the rights of the parties.

ARGUMENT

POINT I

THE HORNE AGREEMENT IS NULL AND VOID FOR LACK OF CONSIDERATION.

The HORNE Agreement as a written document requires little comment because it is manifest in the record in several different forms. Exhibit 4-P was the first draft, never executed, but important as factual background in showing the state of mind of the parties and other circumstances while negotiating the subsequent versions. Exhibit 4-P did not consider the undisputed second mortgage to Mr. GASSER's father which is mentioned in handwritten interlineation in two of the executed versions. It also said nothing about escrowing any documents, nor did it mention the proposed sale to Equitable Savings & Loan as later defined. The record evidences considerable discussion about the change in Paragraph 3 of Exhibit 4-P by which ". . . in the event GASSER is successful in removing HORNE from liability . . . " was changed to use "eliminating" instead of "removing". Thus the intent of the parties was evidenced that HORNE may never become liable for the loan. Consequently, it would not be necessary to "remove" a liability which did not exist, but rather to "eliminate" the need for HORNE to become liable.

Exhibits 5-P and 22-D are identical except that 5-P does not show the signature of Mrs. GASSER. These versions, like the others, were prepared by Mr. Henriod and typed in his office after

conference with Mr. HORNE and Mr. GASSER. Exhibit 6-P, the other manifestation of the HORNE Agreement, does not refer to the \$65,000 second mortgage to Mr. GASSER's father, but all parties admitted that no dispute exists with respect thereto. (Tr. 304). It appears that 6-P was made operative because it shows the acknowledgement of Ralph Marsh as escrow agent on June 29, 1973 and also evidences on the first page that it was document #2 on that date, presumably a convenient reference during the closing. But 6-P has more critical differences, as compared with 5-P and 22-D, which relate to the intent of the parties as well as execution inducement circumstances.

In Paragraph 3 of Exhibit 6-P, the clause ". . . HORNE shall receive no interest in said property by reason thereof . . ." appears in context with the sale to Equitable. In Paragraph 4, concerning sale by American Savings to no party other than Equitable, appears the phrase ". . . to the extent GASSER is able to control the actions of American Savings and Loan, . . .". These changes were inserted at the suggestion of James L. Barker, Jr., counsel for the GASSERS, in his discussions with Mr. Henriod, who appeared to be representing HORNE. (Tr. 145-146). Although Mr. Barker advised the GASSERS against signing the agreement (Tr. 226), he recognized the pressures they were under and thus attempted to gain some relief by not tying the GASSERS to actions of American in marketing the loan elsewhere, over which they may have no control. His changes also emphasize the intent that the HORNES would have no interest

in the property in the event a sale of the loan with the GASSER's signatures alone was successful. Exhibit 6-P is the only Agreement version showing the changes requested by Mr. Barker.

The perspective will be broadened in a later demonstration that HORNE did not become liable on the note as a matter of fact (and law) after execution of the HORNE-GASSER Agreement and closing of the loan by GASSER. We argue here the elementary concept that the Agreement lacked consideration ab initio. Of striking significance in the Agreement is the fact that HORNE makes no promise or covenant whatever! The last "Whereas" clause recites that HORNE is willing, under certain conditions, to provide financial backing for the loan. That clause does not represent a specific covenant, although the agreement to perform some unarticulated act might be inferred from the context and explained by parol evidence. Even that inference is questionable when it is remembered that HORNE joined with GASSER on an earlier application to Prudential (Ex. 14-D), but never did intend to become liable to Prudential. (Tr. 357). Perhaps he intended no liability at American Savings either, but in any event, he achieved just that. Without an express covenant by HORNE, the consideration recited of "mutual promises and agreements of the Parties" must be interpreted as showing no consideration. Only GASSER makes promises in the Agreement. There is no "mutual" promise of HORNE. In undisputed testimony, HORNE told

GASSER that he would not take compensation for signing a note and mortgage if he could get released within a reasonable time. (Tr. 112). With that intent, HORNE made no promise even to become obligated, and in fact, never did. Without mutuality of obligation, there is no consideration. On its very face, therefore, the Agreement is unenforceable and of no effect.

As a result of the foregoing, the lower court's Finding No. 5 (R. 228) is erroneous in finding that HORNE agreed to become personally liable on the \$1,050,000.00 note to American Savings. Further, Finding No. 15 (R. 230) is erroneous in its statement that the Agreement was supported by fair and adequate consideration. This Court, on appeal, must find and conclude that the Agreement lacked consideration ab initio and did not subsequently develop any consideration which would support GASSER's promises. The lower court's judgment should be reversed on that ground.

Even if the Court construed HORNE's actual signature on the alternative note as extrinsic evidence to the Agreement supporting an inference that HORNE promised to become liable, then the Court must also consider external circumstances concerning whether HORNE actually became liable. In the first instance, a lack of promise created a lack of consideration. In the second instance, although a promise may have been inferred, there was a failure of consideration when HORNE did not actually become liable on the operative

documents. The lower court's willingness to give effect to a contract which either lacked or failed for consideration, or both, cannot be upheld.

The Court will observe from the record that the note and Trust Deed from the GASSERS (without the HORNES' signatures) was actually sold to Far West Savings & Loan under a participation by which American retained 25% and the servicing. (Ex. 1-P, Tr. 246, 251). After the closing through escrow on June 29, 1973, that Trust Deed was recorded on July 2, 1973. The participation agreement between American and Far West (part of Ex. 1-P) clearly evidences in Paragraph VI that no loan could be sold which was in default. American represented that the payments were current, but such could not be so without payments from the borrower. The record is clear, however, that HORNE was never asked to pay and never did pay any portion of the payments, even as of the date of trial 18 months after the sale to Far West. Also, the participation certificate clearly indicates that JOSEPH S. GASSER, JR. was the principal debtor, and no mention is made of HORNE. At no time did HORNE attempt to assert that he was liable with GASSER on the note, for the record is devoid of any suggestion that he contacted American Savings or Far West after the loan was closed and sold, to assert his interest in the property and his liability on the note. By his own admission, HORNE never was billed for any payment. (Tr. 361). GASSER received all the coupon books and arranged to make

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231 (Ore. 1969); White v. Saby, 260 P.2d 1116 (Mont. 1964). Moreover, although the general rule is that almost any benefit to a promisor or detriment to a promisee, however slight, can constitute consideration, there must be some benefit, profit, or advantage to the promisor or some loss, detriment or inconvenience to the promisee. See Swindel v. Kelly, 499 P.2d 291 (Alaska 1972); Kadish v. Kallof, 414 P.2d 193 (Ariz. 1966); Blonder v. Gentile, 309 P.2d 147 (Calif. 1966).

A recent Utah case, Manwill v. Oyler, 361 P.2d 177, 11 Utah 2d 433 (1961) adopts the general position followed by other courts. The Manwill case involved an action on an alleged agreement to repay to the Plaintiff the amount of payments he had made on the Defendant's behalf. The court held that in order for a contract to be binding, each party must be bound to give legal consideration to the other by benefitting him or suffering a legal detriment at his request. Mere moral obligation is not a valid consideration. In the case at bar, HORNE did not suffer a legal detriment and GASSER did not gain a legal benefit, either in the language of the Agreement as written or in the actual implementation of the loan from American Savings which was contemplated by the Agreement. HORNE did not promise to pay, give up or otherwise suffer anything under the terms of the Agreement. When the loan was finally made and also when it was sold to a participating institution, only the GASSERS were bound by the documents. HORNE

did not promise to become and did not actually become liable on the note. GASSER would have no recourse against HORNE for payment by contribution. Neither American Savings nor Far West Savings had any legal right to impose liability on HORNE for payment. Indeed, they did not intend to rely on HORNE and have not actually done so; HORNE has not paid and has not been requested to pay one penny toward the loan. Yet he tries to rely on this lack of consideration as a basis for recovering 50% of a mobile home park!

POINT II

THE HORNE AGREEMENT IS NULL AND VOID AS HAVING BEEN EXECUTED BY THE GASSERS UNDER DURESS.

This part of Appellants' argument is both more difficult to explain and more sensitive. Without intending to reflect adversely on acts of opposing counsel, we are nevertheless forced to include a description of the performance of Mr. Henriod as part of the circumstances constituting duress. Ordinarily, neither the court nor opposing counsel would have any right to tell another attorney whom he must represent. Yet it is part of Appellants' claim here that Mr. Henriod either represented the HORNES as their counsel in the GASSER transactions, or acted in such manner as to lead the GASSERS and their counsel, Mr. Barker, to believe such representation existed. By objective evidence later detailed, the record supports the proposition that both HORNE and Mr. Henriod

led the GASSERS to believe Mr. Henriod had authority to bind the HORNES. Under the evidence, the HORNES must be so bound by acts of Mr. Henriod.

The duress which should invalidate the HORNE Agreement is briefly summarized as follows:

1. Mr. Henriod, acting on behalf of the HORNES, threatened the GASSERS that if they did not sign the HORNE Agreement, the Skankey foreclosure on property of the GASSERS would be completed;

2. Mr. Henriod and HORNE threatened American Savings Loan that they must go through with the GASSER-HORNE loan or suffer litigation at a time when American may have granted a loan with higher interest rate to the GASSERS alone without the HORNES and with a pre-committed sale; and

3. Mr. Henriod had an unconscionable conflict of interest in representing the Skankey Group and HORNE through at least part of the GASSER transactions.

The detailed factual and legal arguments to follow will amplify Appellants' contentions that the facts in the record support Appellants' positions as summarized above and do not support the lower court's Findings No. 12 (claiming that Mr. Henriod did not represent HORNE), No. 14 (claiming that Plaintiffs were not induced, coerced or intimidated) and No. 15 (claiming that Defendants were not guilty of other wrongful or improper conduct). (R.

Subject to later discussions of certain legal and evidentiary points, the detailed evidence concerning duress on the GASSERS is demonstrated by the following recapitulation:

1. The so-called Skankey Group was represented by Mr. Henriod (Tr. 290), but Dr. Skankey personally was represented also by Richard Harris, Esq. (in Mr. Marsh's escrow office in the meeting of June 20, 1973 (Tr. 76), and according to Mr. Henriod's testimony. (Tr. 345).

2. Early in the HORNE-GASSER negotiations, Mr. HORNE told Mr. GASSER, in undisputed testimony, that Mr. Henriod was his attorney. (Tr. 78). Thereafter, Mr. Henriod admittedly prepared the draft agreement, Exhibit 4-P (Tr. 292) and commenced discussions with HORNE and GASSER resulting in 5-P, 6-P and 22-D (Tr. 86). Although GASSER and HORNE commenced initial discussions without the assistance of Mr. Barker for GASSER and Mr. Henriod for HORNE, it was only natural that the definitive agreements would be prepared and reviewed by the respective counsel. HORNE turned to Mr. Henriod for this purpose because Mr. Henriod had represented him on prior matters (Tr. 319) and obviously commenced representing him in connection with this lawsuit after it was filed (Tr. 331).

3. During a meeting at Mr. Henriod's office attended by HORNE and GASSER on June 27, 1973, HORNE demanded his 50% interest in Hillgate Terrace under circumstances which caused GASSER to

walk out of the meeting rather than state what he really felt. (Tr. 84). Later, Mr. Henriod told GASSER that he should work things out with HORNE. (Tr. 86). Exhibits 5-P, 6-P and 22-D followed those discussions.

4. Even though Mr. Barker's position as counsel for GASSER was known, Mr. Barker permitted GASSER to speak directly to Mr. Henriod on most occasions without Mr. Barker's intercession as counsel. (Tr. 103).

5. The squeeze-play on the GASSERS between Mr. Henriod Skankey clients and his HORNE clients began gradually and is demonstrated most aptly by Exhibit 17-D. On May 7, 1973, Mr. Henriod wrote Mr. Barker a letter concerning the HORNE-GASSER Agreement (presumably the draft, Exhibit 4-P) and complained of lack of communication in working out details before closing the loan. Mr. Henriod therein stated, "We need to prepare escrow instructions which are going to meet your approval and your clients approval and also mine and my clients approval. We also need these agreements circulated to obtain my client's approval." Notwithstanding inconsistent use of apostrophes on the word "client", the last use as "client's" suggests that he is talking about HORNE rather than the Skankey Group. Furthermore, Exhibit 18-D, the Skankey settlement agreement, had been executed some time earlier, and it was not necessary for Mr. Barker to review that again. The inescapable conclusion is that Mr. Henriod, on behalf of his client HORNE, was seeking some responses from Mr. Barker relative to the HORNE-GASSER Agreement.

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6. Although Mr. Henriod continued to put pressure on GASSER to pay Skankey and the Skankey Group after November 1972 (Tr. 112-113), yet the communications between GASSER and Mr. Henriod were somewhat tension-free until June 11, 1973. On that date, Mr. Henriod summoned GASSER to his office and delivered a letter of demand (Ex. 16-D) by which the obligations to the Skankey Group had to be paid by June 25, 1973. (Tr. 121). This demand accelerated the squeeze-play.

7. During a conversation between Mr. Barker and Mr. Henriod after submission of Mr. Henriod's draft resulting in Exhibit 5-P, on or after June 25, 1973, Mr. Barker told Mr. Henriod that the agreements were unfair and did not represent what HORNE had earlier agreed to. Mr. Henriod responded that his client (HORNE) had changed his mind. This testimony remains undisputed in the record. These events also form part of the entire context wherein Mr. Henriod was acting solely for Mr. HORNE's interests in conversations with GASSER and Mr. Barker, in matters which were of no direct concern to his Skankey clients. Mr. Henriod would not have reason to discuss HORNE's matters with Mr. Barker if he were not purporting to represent HORNE.

8. When the closing was imminent and the HORNE Agreement had not yet been finalized as of June 26, 1973, Mr. Henriod contacted HORNE in San Francisco and arranged for the HORNES and the GASSERS

to meet the next day to complete the Agreements. (Tr. 301). HOP confirmed Mr. Henriod's testimony in that regard in language which certainly sounds as if an attorney and his client are conversing:

"Q (By Mr. Halgren) Mr. Horne, when you were contacted by Mr. Henriod sometime on the 26th day of June 1973 by telephone do you recall anything that was discussed between you and Mr. Henriod at that time?

A Yes.

Q Would you tell me what was said?

A Mr. Henriod asked me if I was ready to sign the agreement that had been prepared sometime earlier.

Q And what did you tell him?

A I told him that it was an entirely different time, that I didn't know if I was prepared to sign it or not; that I would be back in Salt Lake the next day and we would discuss it." (Tr. 359).

9. In conversation between Mr. Marsh, escrow agent, and Henriod during the week of June 25th, Mr. Henriod stated that GASSER had accused him of a conflict of interest in representing both the Skankeys and the HORNES. Mr. Henriod's comment was: "I guess I have a conflict but we will have to let the chips fall where they may with respect to that." (Tr. 203-204). (See later discussion re: proffer of proof in connection with this testimony). Mr. Henriod did not deny making that statement to Mr. Marsh, although he consistently couldn't "recall" such statement. (Tr. 352). In testimony of GASSER which appears embarrassing at first glance, but in substance does not impair his evidence or his legal position, GASSER asked

HORNE not to tell Mr. Henriod of the value of the mobile home park as demonstrated by an appraisal of Mr. Kiepe (Tr. 115). GASSER felt keenly the conflict which Mr. Henriod didn't want to face (or escape) and believed that the value of the park necessary for the loan (and to satisfy HORNE if he should join the loan) was so high that the Skankey agreement might be upset if Mr. Henriod realized the full value. HORNE, for selfish interests, was willing to withhold that information from his own attorney.

10. The squeeze-play on the GASSERS became downright difficult when the threats from Mr. Henriod were intensified. When GASSER asked for another weekend after June 29, 1973 to think about HORNE's demands for 50% and the imminent closing of the loan, Mr. Henriod told him, "No, you have no more time, if you don't sign today my clients will foreclose and there will be nothing left of the situation." (Tr. 88 and 147). Mrs. GASSER, recalling similar threats from Mr. Henriod, characterized them as leading her to believe that they would "lose everything" by Mr. Henriod's foreclosure. (Tr. 174). She specified that although Mr. Henriod was making the threats, they were really for HORNE's benefit. (Tr. 187).

Although Mr. Henriod denied threatening that the GASSERS "would lose everything" (Tr. 306), which was probably the GASSERS' characterization of the import of his threats, Mr. Henriod clearly stated his threats in response to questions by Mr. Halgren:

"Q What I'm talking about, the critical time now when he has either got to fish or cut bait, he either has to get this loan finalized or he loses the whole thing.

A I think in the 28th -- on the 28th, I think I said 'If you don't come up with the money by the 28th or 29th, now, that it will be necessary for me to foreclose.' I had already given the written notice to that effect on the 11th.

* * *

Q Well, you were threatening to foreclose.

A Yes, I was threatening to foreclose but that was only part of his assets." (Tr. 336-337).

The nature of the foreclosure is also clarified by Mr. Henriod, with emphasis showing that his threats were not mere idle talk:

"Q (By Mr. Nielsen) Will you state when and what was done?

A About March of 1973 we commenced an action against Mr. Gasser and in the State of Montana to foreclose the interest that had been assigned to secure the payment of the \$225,000. Also prepared pleadings which were not filed to foreclose the interest in the Layton trailer park." (Tr. 337).

It is evident that Mr. Henriod meant business. And he was thus in a strong position to tell the GASSERS that they must go along with the HORNE demands or his already-commenced foreclosure in Montana would be completed and his about-to-be-commenced foreclosure in Utah would be implemented.

11. It is incongruent for Mr. Henriod to be involved in the squeeze-play on the GASSERS as he otherwise admitted that

didn't really care where the money for the Skankey Group came from. In the same regard, he was not sufficiently concerned about the appraisal on the park to ask Horne for a copy of the appraisal. (Tr. 317). His reasons:

"Q Did you have any particular reason why you were not concerned with the appraised value of this property?

A My concern was getting the \$468 or \$470,000, plus the \$225 for my clients, wherever Mr. Gasser got his money was of no concern to me except that he got it and paid it." (Tr. 318).

12. The threats constituting duress on the GASSERS assumed a different but sharper focus when both Mr. Henriod and HORNE put pressures on American Savings & Loan relative to the GASSER matter. When GASSER was seeking to restructure the loan without any need of HORNE's signature, he had preliminary indications from American Savings that an interest rate of 9% may be hard to sell with the GASSERS alone on the documents, but with a 10% rate (which GASSER agreed to pay) the loan would be more marketable. (Tr. 124). The question of using a higher rate loan with the GASSERS (but not the HORNES) is connected closely with the demands made by HORNE and Mr. Henriod that American Savings go along with them and not negotiate further with the GASSERS. The import of the evidence is that American Savings was willing to make a loan on an increased rate to the GASSERS alone without the HORNES and without a pre-committed sale to another financial institution. No written commitment to that effect was ever finalized, however, by reason of the pressures from HORNE and Mr. Henriod.

During the testimony of Mr. Bradshaw, President of American Savings & Loan, the following dialogue occurred:

"Q (By Mr. Halgren) Well, was there any discussion relative to a change in the rate of interest relative to this loan?

A There was discussion about a change in the rate of interest.

Q Was the change up or down"

-- (Objection by the Court to leading question) --

Q All right, How was the change?

A It was to be changed upward so the loan could be sold.

Q And what importance was that that the loan could be sold?

A Well, there was a lot more people in the market when the rate is high and they overlook certain things when it's a profitable loan.

Q What was Mr. Gasser's position with regards to any increase in the loan rate?

A He was willing to have it increased." (Tr. 240)

Further testimony of Mr. Bradshaw suggested the pressures his institution felt:

"Q (By Mr. Halgren) Do you know of any thing that arose in the business of American Savings that caused American Savings and Loan not to increase the loan rate to ten percent?

A Well, as previously stated it got to be a hassle and got to be involved with two sides, I honestly don't think I was ever threatened. You said threatened, I don't think I was ever threatened or anything like that, but it got uncomfortable to the point where it was kind of messy. We talked it over with our counsel, he advised us not to raise it, not to be involved." (Tr. 241).

"Q (By Mr. Halgren) Did you have any conversation with either Mr. Horne or Mr. Henriod relative to their position on an increase in the loan rate.

A I can't remember the specific exact conversation, no, I can't, but I know that gist of it, that we learned both sides and the problems, and that's why we backed down.

Q So because of that you kept Mr. Dave Horne's name on the loan application and included him as a party in the transaction, is that correct?

A I think he isn't a party to the transaction, is he?"
(Tr. 242).

The first statements above evidence that American Savings would have gone forward with the GASSERS on a loan with increased rate, without the HORNES, if American Savings hadn't backed down. After learning the problems concerning Mr. HORNE and Mr. Henriod, however, American Savings backed down. Even without strong threats from them, it is obvious that American Savings terminated its further discussions with the GASSERS as a result of the HORNE-Henriod pressures. The trial judge characterized these activities as "Interfering with a contractual relationship" (Tr. 238) and decided that such activities may give rise to a tort liability but should not be used to declare the agreement null and void. Appellants here urge that such "interference" is part of the duress on the GASSERS which should properly be used as a basis for invalidating the HORNE Agreement. Mr. Bradshaw's last answer quoted above evidences that HORNE was not on the operative documents, and he wondered why Mr. Halgren described HORNE as a "party" to the transactions.

During an earlier dialogue as part of Mr. Bradshaw's testimony, the court erroneously refused to allow Mr. Halgren to use Mr. Bradshaw's deposition as a means of refreshing recollection and clarifying matters on which the witness was unclear by the time of trial. (See later discussion of the legal points concerning use of depositions). The depositions should have been used as an aid to the court in understanding the full import of Mr. Bradshaw's testimony. The deposition testimony of Mr. Howard C. Bradshaw, under date of October 9, 1973, clearly spells out both the interest rate consideration and the pressures from HORNE or Mr. Henriod, under the interrogation by HORNE's counsel, Mr. Cook, then affiliated with Mr. Henriod's office:

"Q (By Mr. Cook) Would you state in a general way what the loan market was doing between February of '73 and July of '73 with respect to loans of this nature regarding interest rates and salability of loans of this size? Did that trigger the right things?

A The loans, of course, were increasing, drastically increasing.

Q Interest rates?

A Interest rates. And the loan became unsalable and we asked Mr. Gasser if he would increase the loan so it could be sold. And this benefits me and it evidently benefited him, too, that he didn't have to--he thought maybe he wouldn't have to work with Mr. Horne so he was immediately agreeable so that I could get it up to a rate where I could sell it and he could live without Dave Horne.

Q Now, let's see, the original rate was nine percent as of February 21, 1973, and so to put this thing in a time frame, at what point were you having conversations with Mr. Gasser about increasing that to ten?

A I'm not sure of the dates. I'm sure a month or two after that date.

Q March, April?

A Yes, I think so.

Q And you say he was agreeable to raising the rate of interest?

A Yes. He was agreeable.

Q Then was something done to raise the rate of interest or to attempt to get a commitment to purchase that?

A Yes. The market at that time it could have been sold at the ten percent, but we didn't want to get in this big dog fight so we backed off. I don't know how we could change it.

Q Backed off from selling it?

A No. Backed off--I haven't anything to sell until I can get a new note and mortgage signed up, you see, and I'd have to negotiate a new note and mortgage. At this time this thing kind of exploded or we could see it building up so our attorney, Ed Clyde, said, 'Let's not mess with it.'

Q In terms of --

A Changing the rate. Do you understand that?

Q No.

A Okav. Well--

Q You were saying to Gasser: 'Would you agree to a higher rate of interest,' and he was saying, 'Yes'?

A I will. And if there had been--if that's all there were to it, I'm sure this loan today would have been sold, the new note would have been made at ten percent and recorded, and so on and so forth, and the loan could have been sold and been done with. But in the meantime, Dave Horne called up or Joe Henriod or somebody and said, 'Look, we're in the middle of this thing. We have rights, and you better not do this.' And I reported this to our attorney on the board of directors and he said, 'Forget it, don't mess with it, it's too messy.'

Q You mean rights in the loan commitment at the lesser rate or whatever?

A Yes. He said leave it alone. Let's let them fight it out and we'll go from there." (pp. 22-24).

13. Exhibit 8-P is a set of escrow instructions prepared by Mr. Henriod in connection with the loan closing at American Savings. Most of that document consists of instructions concerning handling of funds and instruments relating to Dr. Skankey and the Skankey Group, and Mr. Henriod expressly states therein that he is attorney for them. However, Mr. Henriod also provided instructions for the benefit of the HORNES as if he were also acting on their behalf. Paragraph III details handling of documents for the HORNES and relating to their interests. The Addendum to Escrow Instructions, part of Exhibit 8-P, slightly revises the instructions for the benefit of the HORNES by advising the escrow agent:

" . . . you are further instructed to hold the Deed from Gasser and Freda to David M. Horne and Jeanne M. Horne and to record said Deed only in the event American Savings & Loan Association requests you to do so."

Such instructions relate only to the interests of the HORNES and were not a necessary part of the Skankey Group instructions. Appellants strongly assert that Mr. Henriod was knowingly acting as counsel for the HORNES in preparation of escrow documents for the loan closing and that his position as counsel for them and as counsel for the Skankey Group and Dr. Skankey provided an opportunity to make demands on the GASSERS which constituted duress.

When the foregoing facts are viewed against the law pertaining to business duress, the Court must concur with Appellants' positions herein stated. This Court has clearly stated the law regarding business or economic duress in prior decisions. In Fox v. Piercey, 119 Utah 367, 227 P.2d 763 (1951), the court reversed the lower court's findings of duress and determined that no duress existed in that particular case. However, after an historical review of the developments of the law pertaining to duress, the governing propositions of law were announced:

"To summarize, then, there have been four distinct phases in the development of the law regarding duress:

1. The ancient rule limiting it to certain specified acts;
2. The enlargement to include any threats, but requiring the 'brave man' test;
3. The relaxing of this rule to apply the 'man of ordinary firmness' test; and
4. The modern rule that any wrongful act or threat which actually puts the victim in such fear as

to compel him to act against his will constitutes duress.

We approve this modern rule." * * * (227 P.2d at 766).

The court in Fox thereafter discussed the difficulties of subjective tests for determining duress and the desirability that an objective standard be used. Describing the rule of law as "modern and liberal", the court nevertheless stated that the act or threat constituting duress must be wrongful, and approvingly quoted the Restatement of the Law of Contracts:

"Acts or threats cannot constitute duress unless they are wrongful, even though they exert such pressure as to preclude the exercise of free judgment. But acts may be wrongful within the meaning of this rule though they are not criminal or tortious or in violation of a contractual duty * * * * 227 P.2d at 766. [Emphasis added].

The applicable law was further discussed by the Utah Supreme Court in Reliable Frurniture Company v. Fidelity & Guarant Insurance Underwriters, Inc., 16 Utah 2d 211, 398 P.2d 685 (1965). In a suit against an insurance company for losses covered by a business interruption policy, plaintiff claimed fraud and duress because settlement of one claim could not be effected without the insurer agreeing to settlement of a claim under another policy for an objectionably low amount. This court reversed and remanded for trial the lower court's summary judgment for the insurer. The court stated:

"In determining whether the plaintiff is entitled to redress, it is not essential that his contentions of fraud and duress be considered separately. They can and should be considered on the basis that he contends they existed, intermingled together. *** If we accept the facts as plaintiff contends them to be, as we are obliged to do on this review, we must assume not only that the plaintiff was in economic distress, but that defendant knew this and took advantage of him by falsely representing that money belonging to the plaintiff could not be delivered to him, and wrongfully refusing to deliver it unless plaintiff would also accept the proffered settlement on defendant's policy, which resulted in compelling plaintiff to accept the latter settlement against his will " 398 P.2d at 687.

The foregoing statement from the court gives rise to some compelling inferences regarding the facts of the case at Bar.

The Reliable case was reviewed again after trial and reported at 24 Utah 2d 93, 466 P.2d 368 (1970). There the court affirmed the judgment favoring defendant. The facts did not support the claimed duress because plaintiff obtained one check and cashed it and had nine days with the other (disputed) check before cashing it, thus leading the court to conclude that whatever coercion may have existed to compel acceptance of the offer ceased to exist before cashing the second check. But the principles of law regarding duress were not changed by the court. Appellants here submit that the duress from Mr. Henriod on behalf of HORNE continued right down to the closing of the American Savings transaction late on June 29, 1973.

Other courts have found duress, as a matter of fact, and have applied similar principles of law with additional nuances of

analysis. In Terrel v. Duke City Lumber Company, Inc., 86 N.M. 405, 524 P.2d 1021 (1974), the court used the terminology "economic compulsion" rather than "duress" and dealt with the subject under classical tort theory. The facts are lengthy and difficult to restate but the court's decision has merit in its legal reasoning and the fact that duress was found to exist sufficient to affirm a judgment for damages. Using the normal elements of a tort, including a duty of care, a breach of that duty, causation and damages, we translate that court's reasoning into the facts at Bar as follows:

(1) Duty of Care: Mr. Henriod and HORNE had the superior bargaining position as the sole effective source of something needed by the GASSERS (the loan) to avoid a severe economic loss. Thus, they had the duty to use that position reasonably to assure the weaker parties (the GASSERS) a reasonable choice of alternatives.

(2) Breach of Duty: The straightforward threat to foreclose on all of the GASSERS' property if they did not sign the HORNE Agreement represented an unreasonable use of a superior bargaining position, especially where GASSER might have obtained a loan at higher rate without the HORNES and where ultimately the subject loan was closed at American Savings, who sold it to another investor, without a higher rate and without the necessity of the HORNES' signatures.

(3) Causation: The direct and proximate cause of the GASSERS' execution of the HORNE Agreement and closing the subject loan with an alternative set of documents was the threats of HORNE and Mr. Henriod regarding foreclosure. As the GASSERS told Mr. Marsh, they were "forced" to go through with the loan and the HORNE Agreement. (Tr. 214).

(4) Damages: Although money damages are not sought by the GASSERS here, suffering the loss to the HORNES of 50% of a mobile home park worth \$1,688,000.00 (Ex. 21-P), and subject to mortgages of about \$1,200,000.00 in the aggregate, without receiving compensation therefor, constitutes serious economic deprivation to the GASSERS.

The Terrel case analysis is not dissimilar to the Utah Court's reasoning in Fox and Reliable, supra. The objective standards by which this court judges wrongful conduct, i.e., conduct of such nature and under such circumstances as to control the will, achieves the same result as describing the wrongful conduct in terms of duty, breach and causation. Whichever words are used to describe the wrong, HORNE's actions, through Mr. Henriod, constitute interference with the free right to seal a new contract with American Savings. As the lower court suggested (Tr. 239) the "contractual interference" must be viewed as a breach of duty resulting in a void agreement between the HORNES and the GASSERS.

A different semantic gloss on the same theme is seen in Dittbrenner v. Myerson, 167 P.2d 15 (Colo. 1946). There duress sufficient to invalidate a contract was found, and the court reversed

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and remanded a judgment for defendant in a case whereby plaintiff alleged duress in sale of real estate through defendant. The court stated, inter alia: "Under the circumstances of the parties here as established without contradiction, actual misrepresentations were not necessary in order to establish constructive fraud." (167 P.2d at 20). The inequality in the Dittbrenner case was one of experience differential between the parties. The inequality in this case is one of financial, or control of the means of obtaining financial relief. While Appellants here have never claimed actual and deliberate misrepresentations by HORNE or Mr. Henriod, under the rule of Dittbrenner, wrongful conduct can be inferred if the result of threats is duress leading to involuntary actions.

It is important to observe that the means of economic duress suffered by the GASSERS here was not just a statement of the rights of Mr. Henriod's other clients to resort to judicial means of collecting matured debts. This is not merely "If you don't pay, I'll foreclose". Such threat to collect by lawful means a just debt due would not constitute actionable duress. The case involves facts far beyond such ordinary conduct. Here we witness an attorney who "held all the aces". He represented Dr. Skankey and the Skankey Group. If he did not represent HORNE (and we submit he did), he placed himself in a position to influence HORNE and control events bearing on HORNE's interests (Ex. 8-P, for example). Thus, by demanding rightful relief for one group through

a wrongful demand that the GASSERS sign the HORNE Agreement, he utilized unfairly a superior bargaining position as the HORNES' de facto representative, to coerce the GASSERS' conduct for the HORNES' benefit. Moreover, the wrongful conduct, if this court were to condone it, would result in a \$300,000.00 windfall to the HORNES for which they neither paid consideration nor suffered any detriment. The flagrant unfairness of the proposition is revolting to our sense of justice.

Accordingly, it is submitted that Appellants have demonstrated the legal and factual grounds on which the court should, and must, reverse the judgment.

Having discussed the operative facts and the governing law concerning duress, Appellants now provide a brief discussion concerning certain evidentiary points mentioned earlier. The first concerns the use of the deposition of Mr. Bradshaw, which was published without objection during trial. (Tr. 232). When Mr. Bradshaw did not respond to Mr. Halgren's questions at trial with the same clarity as shown by his deposition, counsel attempted to permit Mr. Bradshaw to refresh his recollection from page 23 of his October 1973 deposition. In response to objections, the court held that it was not proper to hand the deposition to the witness and let him read it. After counsel attempted to read parts of the deposition into the record, the court sustained an objection to

that procedure. In such rulings, the court erred. The deposition should have been used either to refresh the recollection of the witness or, if the memory remained unrefreshed, to constitute substantive evidence. Rule 63(1) of the Utah Rules of Evidence provides:

"Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(1) a prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement, or (c) it will support testimony made by the witness in the present case when such testimony has been challenged;" [Emphasis added].

The testimony proffered by Mr. Bradshaw's deposition, quoted at length in the factual discussion paragraph numbered 12 above, was essential as part of the evidence demonstrating the wrongful conduct of Mr. Henriod for his client HORNE under the rules announced in Fox v. Piercey, supra. Such relevant and admissible evidence should not have been excluded by the trial judge and is susceptible of consideration by this court on appeal. Rule 63(1) of the Utah Rules of Evidence expressly allows the use of deposition as an exception to the hearsay rule under certain conditions,

including the circumstances where the adverse party was present and cross-examined in the prior deposition testimony.

Further confirming Appellants' position is Rule 5 of the Utah Rules of Evidence, which expressly permits the setting aside of a verdict or finding when the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding. Mr. Bradshaw's testimony about pressure from HORNE and/or Mr. Henriod and the resulting "backing down" of American Savings from other negotiations with the GASSERS unequivocally supports the wrongfulness of Respondents' actions and the consequent necessity to reverse the lower court's findings and judgment.

Another evidentiary matter having great significance and adding to the grounds for believing the judgment would be altered but for evidence wrongfully excluded is the proffer of proof through Mr. Ralph Marsh. When Mr. Halgren asked Mr. Marsh about a conversation he had with Mr. Henriod, the court sustained an objection on the basis that it was hearsay as to HORNE. (Tr. 203). In a proffer of proof, Mr. Halgren elicited from Mr. Marsh testimony concerning the conflict of interest to which Mr. Henriod admitted. (Tr. 203-204). When Mr. Halgren asked for a ruling on his proffer, the court replied, "You may proceed back on regular". (Tr. 204). This statement of the court leaves unclear whether the proffered testimony was admitted or stricken. If the testimony was admitted,

then it stands as substantive evidence against the Respondents and their counsel. If stricken, such was wrongful, for the testimony is clearly admissible under Rule 5 and Rule 63(1) of the Rules of Evidence, quoted above. In that event, Mr. Marsh's hearsay testimony at trial relates to the prior statements of Mr. Henriod as a witness, which are admissible as inconsistent with his testimony at trial.

POINT III

AS AN ALTERNATIVE TO OUTRIGHT REVERSAL OF THE JUDGMENT, APPELLANTS SEEK REMAND FOR A TRIAL BY JURY WHICH WAS WRONGFULLY DENIED.

During pendency of the case below, counsel for Defendants requested a non-jury trial as of February 22, 1974. (R. 132). The case was set for trial October 11, 1974 and continued to October 1974 (R. 156). Prior to the trial setting, Mr. Halgren, then counsel for Plaintiffs, paid the \$15.00 jury fee on September 11, 1974. The case was then continued again to February 5, 1975. (R. 155). Although the notices of continuance do not clearly state, the circumstances clearly indicate that the parties expected a jury trial. On February 3, 1975, counsel for Defendants filed a motion to strike the case from the jury calendar (R. 214). The motion was granted by order of February 10, 1975 (R. 220) without designation of reasons for such order. The case was continued

from February 5, 1975 to February 24, 1975 (R. 219) and again to June 25, 1975 (R. 222). Trial commenced before Judge Baldwin June 26, 1975. (R. 261).

The possible grounds for denial of the jury trial, based on the motion to strike, are discussed as follows:

1. "No demand for a jury has been made as required by Rule 15 of the Rules of Practice for the Third Judicial District Court." This ground was not well taken. Rule 15 provides for jury trial upon filing of a written demand and the payment of the required statutory fee, and the demand and fee must be filed at least ten (10) days prior to trial. Payment of the jury fee on September 23, 1974 with trial set for October 11, 1974, and knowledge by Defendants' counsel, constitutes sufficient compliance with that rule. The case was actually set by the clerk on the jury calendar prior to the motion of Defendants, and it is obvious that Defendants' counsel had notice of payment of the jury fee, as a result of which the court is entitled to assume that a demand was made (but not in the record) or that counsel was nevertheless given notice which would be a substitute for the written demand.

2. "Failure of the Plaintiffs to comply with the provisions of Rule 38(b), Utah Rules of Civil Procedure." That Rule preserves the right of trial by jury as declared by the Constitution or as given by statute, and permits a party to demand a trial by jury by paying the statutory fee and serving upon the other

parties a demand therefor in writing. The rule was complied with in the same manner as Rule 15 of the Third District Court, discussed above.

3. "Plaintiffs are not entitled to a jury trial under the constitution and the statutes of the State of Utah, particularly Article 8, Section 9, Constitution of the State of Utah, and Section 78-21-1, UCA, 1953, as amended." The statutory provision cited preserves the right to trial by jury, "in actions for the recovery of specific real or personal property, with or without damages..." (Sec. 78-21-1). Where the GASSERS seek to recover from the HORNES the 50% interest in Hillgate Terrace claimed by the HORNES and embodied in an unrecorded deed, such action is for the recovery of specific real property as contemplated by that statute. Thus, the GASSERS were entitled to a trial by jury.

The constitutional provision cited does not impair the right to jury trial. Article 8(VIII), Section 9 actually deals with appeals, and deals with cases in equity or at law. It seems to be the position of Defendants that the complaint seeks equitable not legal relief, and thus a trial by jury is improper. Yet it is painfully evident from the matters heretofore argued in this brief that substantial questions of fact were raised by the pleadings and the evidence. The complaint seeks a restraining order and a declaration adjudicating that the HORNE Agreement is null and void. (R. 2).

The counterclaim seeks damages plus specific performance and restraining orders. (R.10) A trial concerning rights under a disputed agreement (lack of consideration and duress) and the counterclaim for damages raises factual issues within the province of a jury. A jury can decide issues of fact even in equity cases. And this court can review both fact and law in such cases. Section 78-2-2, UCA, 1953, as amended.

CONCLUSION

Appellants submit that this court should reverse the judgment of the lower court and order judgment for Appellants on the grounds:

1. This court has the power on appeal to review the trial judge's findings and substitute its own, where the evidence would support different findings. This proposition has not been argued in the brief. It is so fundamental that extensive citations are not necessary. See Rule 7(a) Utah Rules of Civil Procedure.

2. The Agreement between the GASSERS and the HORNES (Ex. 6-P) is null and void for lack of consideration.

3. The Agreement between the GASSERS and the HORNES is of no effect because execution thereof by the GASSERS was induced by the threats and other circumstances constituting business or economic duress. Such duress deprived the GASSERS of visible alternative methods of refinancing the subject mobile home park or otherwise obtaining financial relief. As a result, execution of the Agreement by the GASSERS was not voluntary.


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4. The HORNES are not entitled to receive a 50% interest in the mobile home park without consideration, as a matter of law or equity.

Alternatively, Appellants seek remand for jury trial which was erroneously denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that 2 true and corrent copies of the foregoing Appellants' Brief were mailed, postage prepaid this 1st day of June, 1976 to the offices of the following:

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