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Leon H. Saunders, Robert Felton, J. Richard Rees, Saunders LAnd Investment Corp., a Utah corporation, White Pine Ranches, a Utah general parternship, and White Pine Enterprises, a Utah general partnership v. John C. Sharp, Geraldine Y. Sharp and Associated Title Company, a Utah corporation, as Trustee v. Commissioner of Financial Instructions As Receiver For Tracy Collins Bank and Trust Company : Brief of Respondent

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Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

LEON H. SAUNDERS, ROBERT FELTON,
J. RICHARD REES, SAUNDERS LAND
INVESTMENT CORP., a Utah
corporation, WHITE PINE RANCHES,
a Utah general partnership, and
WHITE PINE ENTERPRISES, a Utah
general partnership,

Plaintiffs/Appellants,

vs.

JOHN C. SHARP, GERALDINE Y. SHARP
and ASSOCIATED TITLE COMPANY, a
Utah corporation, as Trustee,

Defendants/Respondents,

vs.

COMMISSIONER OF FINANCIAL
INSTITUTIONS AS RECEIVER FOR
TRACY COLLINS BANK AND TRUST
COMPANY, as Surety,

Surety/Appellant.

RESPONDENTS' BRIEF
TO COMMISSIONER OF
FINANCIAL INSTITUTIONS

Case No. 880710-CA

(Priority 14(b))

APPEAL FROM JUDGMENT AND FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT OF AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE J. DENNIS FREDERICK

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STATE OF UTAH

AUG 17 1990

SEP 20 1989

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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J. RICHARD REES, SAUNDERS LAND
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JURISDICTION

Section 3 of Article 8 of the Utah Constitution, Section 78-2-2(3) of the Utah Code Ann. and Rule 3(a) of the Rules of the Utah Court of Appeals confer jurisdiction on this Court to hear this appeal.

NATURE OF PROCEEDINGS

This appeal is from a final Judgment (hereinafter "Judgment") of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick presiding, dismissing the Plaintiffs' Complaint, no cause of action, and granting judgment against Leon H. Saunders, Robert Felton and Kenneth R. Norton dba Interstate Rentals, Inc. on a Trust Deed Note, ordering the property as security under the Trust Deed Note (hereinafter "the Property") be judicially foreclosed and entering judgment for damages suffered due to a wrongful injunction against Tracy Collins Bank and Trust Company (hereinafter "Tracy Collins") as surety on a bond.

PERTINENT RULE

The pertinent provision of Rule 65A(c), Utah R. Civ. P. is as follows:

(c) Security. Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained....

(emphasis added).

STANDARD OF REVIEW

The trial court's findings of fact will not be set aside on appeal unless clearly erroneous. Utah R. Civ. P. 52(a); e.g., Copper State Leasing Co. v. Blacker Appl. & Furn. Co., 770 P.2d 88 (Utah 1988); Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987). A finding is clearly erroneous only if it is without adequate evidentiary support. State v. Walker, 743 P.2d 191 (Utah 1987); Western Capital v. Knudsvig, 768 P.2d 989 (Utah Ct. App. 1989).

This Court's analysis should begin with the trial court's findings of fact and not with Appellant's view of the facts. Ashton v. Ashton, 733 P.2 147 (Utah 1987). It is Tracy Collins' heavy burden to first marshall all evidence that supports the lower court's findings, "and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence'...." In re Estate of Bartell, 105 Utah Adv. Rep. 3, 4 (1989) (quoting Walker, 743 P.2d at 193).

In fixing damages, the trial court is vested with broad discretion, and its award will not be set aside unless it is manifestly unjust or indicates that the trial court neglected pertinent elements. Maybey v. Kay Peterson Const. Co., 682 P.2d 287 (Utah 1984); Gillmor v. Gillmor, 745 P.2d 461 (Utah Ct. App. 1987). Similarly, an award of attorney's fees is left to the sound discretion of the trial court and will not be overturned in

absence of a showing of clear abuse of that discretion. Dixie State Bank v. Bracken, 764 P.2 985 (Utah 1988); Turtle Mgt. v. Haggis Mgt., 645 P.2 677 (Utah 1982).

STATEMENT OF THE CASE

This action arose when Plaintiffs (hereinafter collectively "White Pine Ranches") enjoined the Sharps' scheduled Trustee's Sale the day before it was to occur by filing a complaint alleging certain breaches of contract. Enjoined from proceeding with the Sale, the Sharps counterclaimed, inter alia, for a judgment dissolving the injunction and for a determination that the restraining order was wrongfully issued, that White Pine Ranches breached the contract, and for an order of judicial foreclosure of the Property. The Temporary Restraining Order initially issued on September 4, 1986 required a bond in the amount of \$2,400.00. Because the cash bond was inadequate for the continuing injunction, Judge J. Dennis Frederick ordered additional security in the amount of \$50,000.00, which Tracy Collins posted on January 11, 1988.

The court below held the Sharps had been wrongfully enjoined from holding their Trustee's Sale and as a result incurred over \$100,000 in interest to the time of trial, attorney's fees in defending the wrongful injunction, and trustee's fees. Conservatively, to prevent any double recovery, the trial court determined the fair market value of the Property and awarded damages on the

bond only for the amount (\$28,570.63) which the Sharps were undersecured.

CITATION TO THE RECORD

Citations to the record will be abbreviated as follows:

Record on Appeal:	"R."
Trial Transcript:	"Tr."
Exhibit:	"Ex."
Finding of Fact:	"F."
Conclusion of Law:	"C."
Supplemental Finding of Fact:	"Supp. F."
Supplemental Conclusion of Law:	"Supp. C."

A copy of the Order Re: Motion to Set Liability on Bond, containing the Supplemental Findings ("Supp. F.") and Supplemental Conclusions of Law ("Supp. C.") is attached in an Addendum. The Addendum shall be cited after the citation to the record or Ex. as "Add." with the page number. Tracy Collins attached only a draft of the Findings and Conclusions to its Brief, in which Conclusion No. 33 is incorrectly set forth, as well as other Findings and Conclusions not relevant here. A correct copy of the Findings and Conclusions will be attached as an Addendum to the Respondents' Brief to Saunders, et al.

STATEMENT OF FACTS

The following facts are necessary for a proper determination of this appeal in addition to and/or to rectify the facts set forth in the Brief of Surety/Appellant:

1. The trial judge held that:

The Sharps are entitled to be paid the bond posted by Plaintiffs with the Summit County Clerk in September, 1986 in the amount of \$2,400 and to be paid from the security posted by Tracy Collins Bank in the amount of

\$28,570.63 for their interest, attorney's fees and other damages incurred as a result of the issuance of the wrongful Temporary Restraining Order, and for which amount the Sharps are not secured by the fair market value of the Subject Property.

C. No. 33 (R. at 1363) (emphasis added).

2. The trial court found that interest on the principal due under the Trust Deed Note for the period July 1, 1986 to July 30, 1987 equalled \$66,913.08, and interest for the period July 1, 1987 to March 22, 1988 amounted to \$48,764.04. Supp. F. No. 8 (R. at 1395); Add. at 3. Then the lower court held "[t]he amount of interest alone which [h]as accumulated (over \$100,000) since September, 1986, when the injunction was first issued far exceeds the amount of both plaintiffs' cash bond and the security posted by Tracy Collins Bank." Supp. C. No. 4 (R. at 1396-97); Add. at 4-5.

3. Attorney's fees were incurred by the Sharps in the amount of \$5,763.55, resulting from the wrongful injunction "related to the defense of White Pine's injunction," not just to the defense of the Temporary Restraining Order as claimed by Tracy Collins, and excluded legal services from and after January, 1988, through the trial, post-trial motions and the appeal. Supp. F. No. 10 (R. at 1396); Add. at 4.

4. The matter of attorney's fees was reserved by stipulation until after trial. Tr. 413 (R. at 1644). When presented, Tracy Collins did not object to the affidavits of Sharps' counsel setting forth the fees resulting from the wrongful injunction. R. at 1251-1620 and 1640.

5. Tracy Collins loaned White Pines \$650,000 for construction of the improvements on the Property. Ex. 77. Approximately two-thirds of this loan remained owing at trial. Ex. 64, introduced but not received; Plaintiff Felton's Testimony, Tr. 118 (R. at 1642).

SUMMARY OF ARGUMENT

In its Brief, Tracy Collins claims the district court erred in granting its Order re: Motion to Set Liability on Bond (hereinafter "Order"), which Order found liability on the bond for the difference between the Judgment in the underlying action and the fair market value of the Property subject to the Judgment. (A complete copy of the Order is attached as Add. at 1-5). This misstates the trial court's Order. Instead, the lower court found that the "costs and damages" resulting from the wrongful injunction, including attorney's fees and interest, greatly exceeded the amount of the bond issued by Tracy Collins. However, to avoid any possibility of a double recovery, the court reduced the award of damages to the extent that the Judgment was secured by the fair market value of the Property at the time of dissolution of the injunction.

These "costs and damages" were "incurred and suffered" by the Sharps as a direct result of the wrongful injunction. But for White Pine Ranches enjoining the Sharps' foreclosure sale, the Sharps would have foreclosed and received either the Property or its value two years earlier. Alternatively stated, if the

Trustee's Sale had not been enjoined, no interest would have accrued (at least to the extent of the current value of the Property). Further, as a direct result of the injunction, the Sharps were forced to hire attorneys to resist and to seek dissolution of the injunction.¹

Tracy Collins cannot raise the defense of ultra vires for the first time on appeal. Moreover, this defense would have failed on the merits since Tracy Collins exercised its valid banking power to protect its \$650,000 construction loan made to White Pine Ranches. In addition, Tracy Collins is equitably estopped from denying liability since the injunction was continued as a result of the bond.

ARGUMENT

POINT I

THE SHARPS ARE ENTITLED TO INTEREST, HAVING BEEN WRONGFULLY ENJOINED FROM FORECLOSING FOR TWO YEARS

The Sharps have been severely damaged as a result of the wrongfully issued injunction due to the fact they were unable to foreclose on the Property for two years and therefore incurred

¹ Under Utah law, Utah Code Ann. Section 57-1-32, the Sharps must have credited the fair market value of the Property at the time of the Trustee's Sale against the debt owed by White Pine Ranches. Thus, as a direct result of the wrongful injunction, the Sharps, enjoined from the foreclosure sale, lost the use of interest on the value of the Property until the injunction was dissolved.

over \$100,000 in interest. Pursuant to Rule 65A(c), Utah R. Civ. P., the Sharps are entitled to recover from the security provided by Tracy Collins "for payment of such costs and damages as may be incurred or suffered by them as a result of being wrongfully enjoined or restrained." Utah R. Civ. P. 65A(c) (emphasis added); Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984).

On September 4, 1986, the day before the Trustee's Sale of the Property, White Pine Ranches filed their action and obtained a Temporary Restraining Order. R. at 2-51. Because of the injunction, the Sharps were prevented from conducting a foreclosure sale until the court below rendered its Judgment on September 26, 1988 dissolving the injunction. Judgment (R. at 1370-1377); Tracy Add. C.² Substantially more than \$100,000 in interest accrued during that period on the principal due under the Trust Deed and Note signed by White Pine Ranches. Supp. F. No. 8 (R. at 1395); Add. at 3.

As noted in a case cited by Tracy Collins in its Memorandum of Points and Authorities in Support of Motion for Summary Reversal submitted to this Court, Estate of Sweets v. Behrens, 118

² In fact, no sale has yet occurred since White Pine Ranches has posted additional security to stay execution on appeal.

Misc.2d 1062, 462 N.Y.S.2d 398 (Sup. Ct. 1983),³ interest is a proper element of damages covered by an injunction bond and begins accruing on the date the injunction is initially granted. See also Matter of Simon, 36 N.C. App. 122, 243 S.E.2d 163, 167 (1978) ("Interest accruing on the debt [is] ... a proper measure of damages" resulting from a delay in a foreclosure proceeding); Allen v. Pitchess, 36 Cal. App.3d 329, 111 Cal. Rptr. 658 (Dist. Ct. App. 1974).

Interest should not be excluded, as Tracy Collins argues, as an item of injunction damages merely because it was awarded under the Trust Deed Note in the Judgment against White Pine Ranches. The amount of interest which accrued under the terms of the Trust Deed Note during the injunction far exceeded the \$50,000 bond posted by Tracy Collins. Supp. F. No. 8 (R. at 1395); Add. at 3. However, to avoid the problem of double recovery which concerned the court in Glens Falls Ins. Co. v. First Nat'l Bank of Nev., 83 Nev. 196, 427 P.2d 1 (1967), the trial court below took into consideration the fair market value of the Property at dissolution of the injunction and awarded damages only in the amount by which the underlying judgment was undersecured. Judgment (R. at 1373); Tracy Add. C.

In Glens Falls Ins. Co., the implicit assumption made by the Nevada Supreme Court was that the property at issue adequately

³ Tracy Collins did not cite this case again in its Brief of Surety/Appellant.

secured the amount of the debt, including interest. If the subject Property does not adequately secure the Judgment and the damages for the wrongful injunction, the Sharps must be able to recover the difference against the bond (i.e., the Judgment amount less the fair market value of the Property).⁴ See Financial Acceptance Corp. v. Garvey, 9 Mass. App. Ct. 94, 399 N.E.2d 506, 508 (1979) (To the extent "the proceeds of any foreclosure sale were insufficient," "interest accruing on the first mortgage obligation" is includable as damages under the injunction bond).

Tracy Collins agreed in its Brief that the trial court should have determined the fair market value of the Property upon dissolution of the injunction. See page 11 of the Brief of Surety/Appellant. However, Tracy Collins then erroneously argued the proper measure of damages is the reduction in fair market value of the Property during the period of restraint. Id. Such a view is entirely too simplistic.

⁴ The amount by which the Sharps are undersecured is actually larger than \$28,570.63. To simplify the accounting, the Order did not include all interest on principal to date of Judgment or on attorney's fees or court costs. In the event of an actual sale of the Property, the Sharps will incur the expenses of real estate commissions and closing costs. Further, it will take some period of time to find a buyer and the Sharps will lose the present value of the sales price for the period they have to hold the Property before it sells. These real world costs are precisely the kind which cause a judgment creditor, such as the Sharps, to bid less than fair market value at any Sheriff's Sale of the Property.

Assuming arguendo that the value of the Property did not decrease during the period of restraint,⁵ Tracy's argument ignores the concept of present value. Unless the Property substantially increased in value instead of remaining constant, the Sharps would lose interest on the amount which could have been realized from a sale on or about the date of the Temporary Restraining Order (September 4, 1986), which date was some two years before the entry of the court's Order. The purpose of an award of interest in such circumstances is to put the damaged party in the position he would have been in but for the wrong suffered. See Alexander v. Brown, 646 P.2d 692, 695 (1982); Walter v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973). Stated alternatively, the present value of \$20,000 per acre in 1988 is much less than the same value per acre in 1986.

In Gruber v. Ewbanks, 199 N.C. 335, 154 S.E. 318 (1930) and Surety Sav. & Loan Ass'n v. National Auto. & Casualty Ins. Co., 8 Cal. App. 3d 752, 87 Cal. Rptr. 572 (Dist. Ct. App. 1970), cases cited by White Pine Ranches in its Docketing Statement but not

⁵ At the hearing in January, 1988 on the Sharps' Petition for Additional Security, the trial court found the Property was worth approximately \$17,500 to \$20,000 per acre. Tr. at 493-94 (R. at 1644). Previously, LeRoy Pia, White Pine Ranches' appraiser whose valuations were exclusively used throughout the proceedings, valued the Property on June 30, 1985 at \$29,062.50 per acre. Ex. 96. Accordingly, the value of the Property had been declining from the date of the Temporary Restraining Order (September 4, 1986). (The fair market value at the time of trial was found to be \$20,000 per acre. Supp. F. No. 2 (R. at 1394); Add. at 2).

cited in any Appellants' Brief, the courts held interest was a foreseeable item of damage for wrongful injunction. In Gruber, the court stated:

The creditor is entitled to the same security at the date of the dissolution of the injunction that he had at the date of its issuance -- no more, no less. If by reason of the issuance of the injunction he has lost the interest which has thereafter accrued, this loss may justly be included in the damages, recoverable in the bond.

154 S.E. at 321. In Surety Sav. & Loan Ass'n, the Court declared:

The delay in the sale caused a loss of the use of the money that would have been paid if the sale had not been delayed. Interest on the money during the delay is a measure of damages for the loss of its use.

87 Cal. Rptr. at 576.

In two analogous contexts, supersedeas and performance bonds, interest is awarded as an item of damages under bonds. See U-M Inv. v. Ray, 701 P.2d 1061 (Utah 1985) and New Amsterdam Casualty Co. v. Mitchell, 325 F.2d 474 (5th Cir. 1963). As with supersedeas and performance bonds, the accrual of interest was a foreseeable damage by Tracy Collins at the time of posting its bond. By wrongfully enjoining the Sharps from collecting on the debt, White Pine Ranches caused interest to accrue on the debt and deprived the Sharps of the use of the Property or its value in dollars.

Tracy Collins erroneously interprets the trial court's Judgment as specifying damages for the wrongful injunction to be the difference between the Judgment in the underlying action and the fair market value of the Property. The trial court did not so

determine the damages. Rather, the court below ruled that the damages, including interest, attorney's fees and other damages, greatly exceeded the amount of the injunction bond in their action. Supp. C. No. 4 (R. at 1396-97); Add. at 4-5. Because the Sharps were entitled to recover their interest in the underlying Judgment, the Court then reduced the damages found on the bond amount (to prevent any double recovery) by the amount the Sharps Judgment was undersecured by the fair market value of the Property at the time of dissolution.

POINT II

SHARPS ARE ENTITLED TO ATTORNEY'S FEES AND OTHER DAMAGES BECAUSE OF THE WRONGFUL INJUNCTION

Under Rule 65A(c), Utah R. Civ. P., the Supreme Court has determined that injunction damages "include the attorney fees of the party wrongfully enjoined." Mountain States, 681 P.2d at 1262. Several cases which Tracy Collins cites in its Brief also support the award of attorney's fees by the trial court as damages. See e.g., Beard v. Dugdale, 741 P.2d 968 (Utah Ct. App. 1987) (Attorney's fees awarded to those who were successful in having temporary restraining order enjoining trustee's sale dissolved). Even the Glens Falls case, cited by Tracy Collins, supports the award of attorney's fees:

It is unnecessary to compartmentalize the steps and events surrounding the issuance of a temporary restraining order and effort to obtain a preliminary injunction as suggested by counsel for appellant. The legal steps taken by counsel for respondent after being served with the restraining order can no doubt be said to aid its prospective defense of the cause of action as well as an effort to preclude issuance of the preliminary injunction, but the main thrust of the effort was to defeat

the restraining order.... The amount of the attorneys' fees was discretionary with the trial court. We find no abuse of discretion.

427 P.2d at 3.

Tracy Collins argues attorney's fees incurred in opposing the issuance of the application of the Temporary Restraining Order are not recoverable damages, while such fees are recoverable in "proceedings directed at removing an injunction." Brief of Surety/Appellant at 16. To argue that the Sharps can recover their fees in dissolving the injunction but not in defending against the initial issuance of the Temporary Restraining Order is clearly to suggest a distinction which lacks any logical appeal. This argument also ignores the trial court's finding that \$5,763.55 in attorney's fees "related to the defense of White Pine's injunction," which defense continued through trial.⁶ Supp. F. No. 10 (R. at 1396); Add at 4 (emphasis added). Further, the

⁶ The district court Findings were based upon the Second Supplement to Affidavit in Support of Request for Attorney's Fees in which at least 4% of the total fees related to the defense of the injunction. This was based on a detailed breakdown of the fees through January, 1988. (R. at 1251-60). (The trial was originally set for just two days, January 28 and 29, 1988). Tracy Collins did not object to the affidavit then and therefore cannot object now for the first time. Beard v. Dugdale, 741 P.2d 968, 969 (Utah Ct. App. 1987) ("Appellants ... did not object to the adequacy of the affidavit before the lower court. Accordingly, we conclude that the evidence ... was sufficient as a matter of law"). However, if a more detailed breakdown is required by this Court, the issue of amount of fees could be remanded to the district court as suggested by Tracy Collins in its Brief at 17.

cases Tracy Collins cites for the proposition are clearly distinguishable.

In Estate of Sweets, cited by Tracy Collins in its Memorandum re: Motion for Summary Reversal but not in its Brief, the court distinguished its case from two prior cases allowing attorney's fees for opposing the motion for preliminary injunction because no bond or undertaking had been required when the temporary restraining order was granted. In the two earlier cases where the courts had ordered a bond with the preliminary injunction, attorney's fees were awarded for opposing the temporary restraining order. In Eisen v. Post, 15 Misc.2d 59, 179 N.Y.S.2d 691, 693 (Sup. Ct. 1958), the court noted:

The clearest item of services attributable to the injunction appears to be that rendered in opposing, albeit unsuccessfully, before trial, the continuation of the injunctive provision of the order to show cause in the order for a temporary injunction.

See also Carroll v. Kenin, 25 A.D.2d 743, 269 N.Y.S.2d 226 (App. Div. 1966) (Defendants entitled to recover attorney's fees where efforts of attorneys resulted in vacation of restraining order and denial of the preliminary injunction).

The cases of Wolverton v. Holcomb, 329 S.E.2d 885 (W. Va. 1985) and State ex rel. County of Shannon v. Chilton, 626 S.W.2d 426 (Mo. Ct. App. 1981), cited by Tracy Collins, can both be distinguished. Neither court allowed attorney's fees because the injunctions sought were never issued and bonds were not posted. Therefore, "the proceeding obviously did not involve the question

of whether the injunction should be dissolved." Wolverton, 329 S.E.2d at 889.

This Court's holding in Beard v. Dugdale, supports the award of attorney's fees incurred in opposing a Temporary Restraining Order. In Beard, a temporary restraining order was issued, without opposing counsel being present, and a bond was ordered as security. After a hearing, the temporary restraining order was dissolved. This Court held that attorney's fees incurred after the dissolution of the temporary restraining order did not constitute costs or damages incurred as a result of the wrongfully issued injunction but related to the suit independent of the injunction. However, the trial court implicitly upheld the award of attorney's fees incurred prior to the dissolution of the temporary restraining order (less \$390 worth of time incurred after the dissolution).

The bond posted by Tracy Collins in the instant case should serve as security for the attorney's fees incurred in opposing the Temporary Restraining Order. These fees are damages which result directly and foreseeably from the issuance of a wrongful injunction and should not be segregated from those fees, which Tracy Collins concedes are recoverable, for dissolving the injunction. But for the wrongful Temporary Restraining Order, the Sharps would not have incurred these attorney's fees.

Tracy Collins also suggests, without any reference to the Record, that the issuance of the injunction was so ancillary to

the main action "as to result in a de minimus award of attorneys' fees." Brief of Surety/Appellant at 17. In support thereof, Tracy referred to Global Contact Lens v. Knight, 254 So.2d 807 (Fla. Dist. Ct. App. 1971), without noting the exception recognized therein. The court held where "the means employed, without further or additional services, accomplished both results simultaneously," attorney's fees need not be segregated between the main action and those procuring the dissolution of the wrongful injunction. 254 So.2d at 810; see also McAtee v. Faulkner Land & Livestock, 113 Idaho 393, 744 P.2d 121, 128 (Ct. App. 1987) ("Where the work performed to obtain dissolution of a restraining order or preliminary injunction is the same as that performed to defend against a claim on the merits, there is no basis to segregate recoverable fees from nonrecoverable fees ... forcing the wrongfully restrained party somehow to distinguish among services that are truly indistinguishable."); Esselystyn v. United States Gold Corp., 69 Colo. 547, 196 P. 183, 185 (1921) (Where "it was necessary to try the case fully in order to determine whether the injunction was wrongfully issued..., all expenses connected with such trial are proper elements of damage.").

In this action, the trial court additionally found the Sharps had suffered "other damages" as a result of the wrongfully issued injunction. The trial court found these "other damages" included trustee's fees in the amount of \$1,803.80. F. No. 92 (R. at 1351); Tracy Add. B and Supp. F. No. 9 (R. at 1395); Add. at 3.

The Temporary Restraining Order prevented the Trustee's Sale set for the following day. Under the authorities set forth above, such damages were foreseeable to White Pine Ranches in obtaining the injunction, and as such are recoverable by the Sharps.

POINT III

TRACY COLLINS CANNOT RAISE A DEFENSE OF ULTRA VIRES FOR THE FIRST TIME ON APPEAL; MOREOVER, TRACY COLLINS' ACTS WERE WITHIN BANKING POWERS AND IT IS ESTOPPED TO DENY LIABILITY

Tracy Collins claims for the first time on appeal that it did not have the power to execute the injunction bond and that the bond is therefore void. The defense of ultra vires cannot be raised for the first time on appeal. Wallace Bank & Trust Co. v. First Nat'l Bank, 40 Idaho 712, 237 P. 284 (1925) (Court held defense of ultra vires cannot be plead for first time on appeal in the brief of a receiver of a bank appointed by the Comptroller of Currency of the United States). During trial and the Hearing on Sharps' Motion to Set Liability on the Bond, Tracy Collins never questioned the validity of the bond. Transcript of Motion (R. at 1640). In fact, in a Stipulation re: Tracy Collins Supersedeas Bond entered on December 23, 1988, Tracy repledged the \$50,000 bond as "the supersedeas bond of Tracy Collins securing accruing costs, interest and damages incurred by the Sharps in the event Tracy Collins does not prevail on its appeal." R. at 1583-84. On January 4, 1989, the district court entered its Order re: Tracy Collins Supersedeas Bond in reliance upon the Stipulation. R. at

1581-82. Tracy should not now be permitted to raise such a defense for the first time on appeal.

Moreover, the defense of ultra vires would have failed on the merits. A bank cannot avoid liability on a guaranty or surety contract "where the transaction is for the bank's benefit in furtherance of legitimate banking business." Ries Biologicals, Inc. v. Bank of Santa Fe, 780 F.2d 888 (10th Cir. 1986). In Ries Biologicals, the bank guaranteed the payment of supplies ordered by its debtor even though the benefit to the bank was "incidental." The Tenth Circuit held the bank's involvement as a guarantor was an effort to avoid losses from the failure of its debtor and, therefore, proper banking business. Id. Here, Tracy Collins, like the Bank of Santa Fe, benefited from and was highly motivated by bank business to issue the bond. Tracy Collins had loaned White Pine Ranches \$650,000 to construct improvements on the Property and two-thirds of the loan was owing at the time of trial. By issuing the bond, Tracy Collins was protecting its security. The exercise of such a banking power can hardly be called ultra vires.

Additionally, Tracy Collins is equitably estopped to deny liability on a bond or surety contract from which it benefits and upon which others rely. Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co., 81 Wash. 247, 142 P. 760 (1914) (If plaintiff performed on bond, defendant could not claim ultra vires); See U-M Inv., 701 P.2d 1061. The surety in U-M Inv.

claimed its supersedeas bond was void since the court did not enter an order approving the bond. The Utah Supreme Court held the surety was estopped to deny liability stating:

[Surety's] principals in this case have reaped the benefits of the appeal bond to achieve a stay of execution.... [Surety is] estopped from raising those objections now.

701 P.2d at 1063; cf. Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977).

Here, Tracy Collins is equitably estopped to deny liability. The Sharps were prevented from foreclosing on the Property as a result of Tracy Collins' posting a bond and have been further stayed from execution since the bond continued as a supersedeas bond. Tracy posted the bond in response to court orders and the Sharps have reasonably relied on it to their detriment. Therefore, at the very least, Tracy Collins is now estopped to allege an ultra vires act.

The Commissioner contends that a doctrine analogous to that of "adverse dominion" should apply to excuse its failure to raise the ultra vires defense below. See Brief of Surety/Appellant at 17-18. The doctrine of adverse dominion only applies to statute of limitation questions in suits brought against bank wrongdoers, officers and directors, and has nothing to do with actions involving third parties such as the Sharps in the instant case. See cases cited by Tracy Collins, Federal Deposit Ins. Corp. v. Hudson, 673 F.Supp. 1039 (D. Kan. 1987); Federal Deposit Ins. Corp. v. Carlson, 698 F.Supp. 178 (D. Minn. 1988).

Accordingly, Tracy Collins is prohibited and at least equitably estopped from raising the ultra vires defense for the first time on appeal. Even if the issue was to be decided on the merits, Tracy Collins' acts were not ultra vires since it was attempting to protect its interest in the transaction. Finally, the doctrine of "adverse dominion" is inapplicable to the factual setting of the instant case.

CONCLUSION

Tracy Collins has failed to establish that the district court was clearly erroneous in entering its Order against Tracy Collins. The Findings, Conclusions and Supplemental Findings and Conclusions amply support the district court's Judgment awarding the Sharps damages as a result of the wrongfully issued injunction in the amount of \$28,570.63. Such damages properly included the lost value of money (interest) during the injunction period and attorney's fees and trustee's fees incurred as a result of the wrongfully issued injunction, limited to the amount the Judgment was undersecured by the fair market value of the Property.

DATED this 18th day of September, 1989.

WINDER & HASLAM
Attorneys for Defendants/
Respondents Sharps

By Donald J. Winder
Donald J. Winder

By Tamara K. Prince
Tamara K. Prince

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the foregoing RESPONDENT'S BRIEF TO COMMISSIONER OF FINANCIAL INSTITUTIONS to be mailed, postage prepaid, on this 10th day of September, 1989, to the following:

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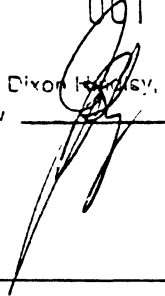
Addendum

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FILED IN CLERK'S OFFICE
Salt Lake County Utah

OCT 5 1988

H. Dixon Hendley, Clerk 3rd Dist. Court
By  Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEON H. SAUNDERS, et al.,
Plaintiffs,

vs.

JOHN C. SHARP, et al.,
Defendants.

ORDER RE: MOTION TO SET
LIABILITY ON BOND

Civil No. C87-1621
(Judge J. Dennis Frederick)

JOHN C. SHARP, et al.,
Counterclaim-Plaintiffs,

vs.

ROBERT FELTON, et al.,
Counterclaim-Defendants.

The Motion of defendants John C. Sharp and Geraldine Y. Sharp (hereinafter the "Sharps") came on regularly for hearing before this Court on September 16, 1988. Plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders, Robert Felton, and Saunders Land Investment Corporation (hereinafter collectively "White Pine") appeared through their counsel,

Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. The Sharps appeared through their counsel, Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince. Tracy Collins Bank was represented by its counsel, Douglas J. Parry. No other parties in this action appeared either in person or through their counsel.

The Court, having reviewed memoranda presented by counsel, having received and reviewed exhibits, having heard the arguments of counsel, and for good cause appearing, hereby makes and enters the following in support of its Judgment entered against plaintiffs' sureties:

SUPPLEMENTAL FINDINGS OF FACT

1. The 7.0414 acres of Lot 6, White Pine Ranches Phase I, according to the final recorded plat filed in the Summit County Recorder's Office, State of Utah, has a present fair market value per acre of \$25,000.00, for a total present fair market value of \$176,035.00 (Ex. 97).

2. The unplatted acreage described on Exhibit "A" to the Judgment entered herein, with one sewer and water connection available, contains 27.6205 acres and has a present fair market value of \$20,000.00 per acre, for a total present fair market value of \$552,410.00 (R. 494 and Ex. 97).

3. Therefore, the present fair market value of the properties upon which the Sharps may foreclose pursuant to the Judgment is \$728,445.00.

4. Under the Judgment, this Court found various of the White Pine plaintiffs jointly and severally indebted to the

Sharps in the total amount of \$759,415.63, excluding interest at the rate of ten percent (10%) per annum from the date of expenditure by the Sharps of trustee fees, Court costs, and attorneys' fees, and until paid by plaintiffs, and excluding interest and penalties assessed on delinquent property taxes from November 30, 1984, through November 30, 1987, and excluding property taxes accruing but unpaid for 1988.

5. Accordingly, the Sharps are under secured by the amount of \$30,970.63, representing the difference between the Judgment (\$759,415.63) and the present fair market value of these properties (\$728,445.00).

6. As a condition of the issuance of the Temporary Restraining Order herein, White Pine posted a bond in the amount of \$2,400.00 with the Summit County Clerk in September, 1986, and subsequently, pursuant to this Court's Order, additional security was posted by Tracy Collins Bank in the amount of \$50,000.00, which was filed January 11, 1988.

7. A Temporary Restraining Order was issued in this matter by the Honorable Judith M. Billings on September 4, 1986.

8. Interest on the principal due under the Trust Deed Note for the period July 1, 1986, to June 30, 1987, equalled \$66,913.08, and interest for the period July 1, 1987 to March 22, 1988, equalled \$48,764.04 (Ex. 122).

9. Delinquent property taxes due just for the year 1987 amounted to \$2,144.15 for Lot 6 and \$2,630.85 for the unplatted acreage (Stipulation of counsel, R. 707-708).

10. Pursuant to the Second Supplement to Affidavit in Support of Request for Attorney's Fees, attorneys for the Sharps were able to identify that at least four percent (4%) of their total fees related to defense of White Pine's injunction. Four percent (4%) of \$144,088.75 is equal to \$5,763.55, excluding legal services from and after January, 1988, through the trial and post-trial motions herein (Supplement to Affidavit of Donald J. Winder dated September 9, 1988).

Having made the above supplemental findings of fact, the Court herewith makes and enters the following in support of its Judgment entered against plaintiffs' sureties:

CONCLUSIONS OF LAW

1. This Court has previously ordered, adjudged and decreed that the Temporary Restraining Order entered in this matter by the Honorable Judith M. Billings on September 4, 1986, was wrongfully issued and it is hereby lifted and dissolved.

2. The Sharps, as the parties enjoined, are entitled to recover their costs and damages, including attorney's fees, incurred as a result of the wrongfully issued injunction.

3. Having determined that plaintiffs were not entitled to the injunction, it is not necessary for this Court to inquire into the good faith or bad faith of plaintiffs in obtaining the injunction.

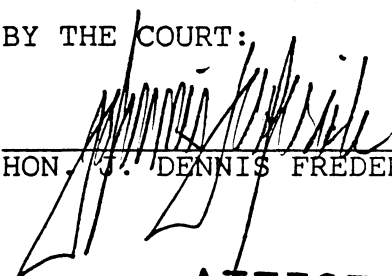
4. The amount of interest alone which has accumulated since September, 1986, when the injunction was first issued, far ex-

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ceeds the amount of both plaintiffs' cash bond and the security posted by Tracy Collins Bank.


DATED this 5th day of Oct, 1988.

BY THE COURT:



HON. J. DENNIS FREDERICK, Judge

ATTEST
A. DIXON HINDLEY
Clerk

By  _____
Deputy Clerk