2009

# Robyn Michelle Hoggan v. Ranee Boley Fleming, Karen B. Gamonal, Joyce H. Crockett, John D Hoggan, Leo V. Jolley, Rosalee J Keele, The Estate of Kriste H. Street, The Estate of Elizabeth D. Jolley Gardner, and John Does 1-100 : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| ROBYN MICHELLE HOGGAN,<br>Plaintiff/Appellant,<br>vs.<br>RANEE BOLEY FLEMING aka RENEE B. FLEMING, KAREN B. GAMONAL aka KAREN HALTERMAN, JOYCE H. CROCKETT, JOHN D. HOGGAN, LEO V. JOLLEY, ROSALEE J. KEELE aka ROSALEE M. HASLAM, THE ESTATE OF KRISTE H. STREET, THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH DUNCAN, and JOHN DOES 1-100,<br>Defendants/Appellees. | District Court No.070902181<br><br>Appellate No. 20090399 |

# REPLY BRIEF OF APPELLANT

APPEAL FROM FINAL ORDER GRANTING DEFENDANTS/APPELLEES' MOTION TO DISMISS, OF THE UTAH THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
THE HONORABLE DENISE P. LINDBERG PRESIDING


Matthew N. Olsen
OLSEN & OLSEN
8142 South State Street
Midvale, Utah 84047
Attorney for Defendant/
Appellee John D. Hoggan

Samuel M. Barker
Jeffrey A. Callister
SMART, SCHOFIELD, SHORTER & LUNCEFORD
A Professional Corporation
5295 South Commerce Drive, Suite 200
Murray, Utah 84107
Attorneys for Plaintiff/Appellant

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| ROBYN MICHELLE HOGGAN,<br>Plaintiff/Appellant,<br>vs.<br>RANEE BOLEY FLEMING aka RENEE B. FLEMING, KAREN B. GAMONAL aka KAREN HALTERMAN, JOYCE H. CROCKETT, JOHN D. HOGGAN, LEO V. JOLLEY, ROSALEE J. KEELE aka ROSALEE M. HASLAM, THE ESTATE OF KRISTE H. STREET, THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH DUNCAN, and JOHN DOES 1-100,<br>Defendants/Appellees. | District Court No.070902181<br><br>Appellate No. 20090399 |

# REPLY BRIEF OF APPELLANT

APPEAL FROM FINAL ORDER GRANTING DEFENDANTS/APPELLEES' MOTION TO DISMISS, OF THE UTAH THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE P. LINDBERG PRESIDING


Matthew N. Olsen
OLSEN & OLSEN
8142 South State Street
Midvale, Utah 84047
Attorney for Defendant/
Appellee John D. Hoggan

Samuel M. Barker
Jeffrey A. Callister
SMART, SCHOFIELD, SHORTER & LUNCEFORD
A Professional Corporation
5295 South Commerce Drive, Suite 200
Murray, Utah 84107
Attorneys for Plaintiff/Appellant

Thomas Christensen, Jr.
Brett N. Anderson
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Attorney for Defendants/Appellees
Ranee Boley Fleming aka Renee B. Fleming, Karen B. Gamonal aka Karen Halterman, Joyce H. Crockett, Leo V. Jolley, Rosalee J. Keele aka Rosalee M. Haslam, Estate of Kriste H. Street, Estate of Elizabeth D. Jolley Gardner aka Elizabeth Duncan Jolley aka Elizabeth Duncan

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### STATE CASES

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| ROBYN MICHELLE HOGGAN,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>RANEE BOLEY FLEMING aka RENEE B. FLEMING, KAREN B. GAMONAL aka KAREN HALTERMAN, JOYCE H. CROCKETT, JOHN D. HOGGAN, LEO V. JOLLEY, ROSALEE J. KEELE aka ROSALEE M. HASLAM, THE ESTATE OF KRISTE H. STREET, THE ESTATE OF ELIZABETH D. JOLLEY GARDNER aka ELIZABETH DUNCAN JOLLEY, aka ELIZABETH DUNCAN, and JOHN DOES 1-100,<br><br>Defendants/Appellees. | District Court No.070902181<br><br>Appellate No. 20090399 |

REPLY BRIEF OF APPELLANT

## ARGUMENT

### I. ELIZABETH GARDNER DID INTEND TO CONVEY AN INTEREST IN THE PROPERTY AT ISSUE.

Defendants argue that the testimony of Plaintiff and other evidence establishes that Elizabeth Gardner did not intend to provide a present interest in the real property at issue in this matter. However, Defendants presume too much from the testimony and evidence. Clearly Elizabeth Gardner did not intend to convey the entire real property, as she left herself on the deed with Defendant John Hoggan as joint tenants. See Addendum "A". The fact that an interest was intended to be conveyed to Defendant John Hoggan is

obvious though and undeniable from the 1991 deed itself and the loan documents. See Addendums "A" and "B". Further, in order to get the loan, the property interest had to be conveyed. *See* Tr. at 34:6-12 and Addendums "A" and "B". Again, the documentary evidence is clear that there was intent to transfer a present interest in the real property, specifically, the 1991 deed and loan documents. See Addendums, "A" and "B".

Defendants also argue that the will shows that an interest was not intended to be conveyed. The will has no effect on the deed recorded on October 23, 1991. The Utah Court of Appeals addressed a similar situation in the case *Matter of Estate of Ashton v. Ashton*, 898 P.2d 824 (Utah Ct. App. 1995). In that case, the decedent and his surviving spouse owned some real property as joint tenants with right of survivorship. See *Id.* at 825. The trial court was reversed on appeal for including this property as part of the estate and not as a non-probate asset that passed according the deed. See *Id.* at 826. The Court of Appeals stated "[w]hen title to property is held in joint tenancy with right of survivorship, a rebuttable presumption arises that the title holders intended to create a valid joint tenancy." *Id.* A party challenging this presumption must show by clear and convincing evidence that the decedent did not intend to create a joint tenancy. See *Id.* Finally, in that case, the trial court had erred by focusing on the decedent's intent when he created his will because the decedent's "intent when he executed his will does not rise to the level of clear and convincing evidence that he did not intend to create the joint tenancies." *Id.* Similarly here, the will does not rise to the level of clear and convincing evidence that the decedent did not intend to create the joint tenancy.

Lastly, Defendants discuss Plaintiff's testimony. As has already been discussed in Plaintiff's initial brief, Plaintiff's testimony was not as conclusive on that point as Defendants have portrayed. Therefore, those arguments should be ignored.

## II. PLAINTIFF HAS MARSHALLED THE EVIDENCE.

Defendants also argue that Plaintiff has failed to adequately marshal the evidence. This conclusion is simply incorrect. The evidence that Defendants point to is irrelevant and not dispositive of intent. For example, consider the argument that Plaintiff failed to marshal the fact that Elizabeth did not have counsel at the time she executed the 1991 quit claim deed. See Defendants' Brief at pg. 13. Whether she had counsel or not has no bearing on her intent.

## CONCLUSION

Based on the foregoing, Plaintiff requests that the decision of the trial court to grant the motion to dismiss be reversed.

DATED this 9th day of March 2010.

Samuel M. Barker
Jeffrey A. Callister
Attorneys for Plaintiff and Appellant

## MAILING CERTIFICATE

I hereby certify that on this 8th day of March 2010, I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to be mailed in the United States mail, first class postage prepaid, to the following:

Thomas Christensen, Jr.
Brett N. Anderson
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Attorney for Defendants/Appellees
Ranee Boley Fleming aka Renee B. Fleming,
Karen B. Gamonal aka Karen Halterman,
Joyce H. Crockett, Leo V. Jolley,
Rosalee J. Keele aka Rosalee M. Haslam,
Estate of Kriste H. Street,
Estate of Elizabeth D. Jolley Gardner aka
Elizabeth Duncan Jolley aka Elizabeth Duncan

Matthew N. Olsen
OLSEN & OLSEN
8142 South State Street
Midvale, Utah 84047
Attorney for Defendant/Appellee John D. Hoggan

_____
Secretary

G:\SLDOCS\SBarker\RETAINED CASES\H\HOGGAN, ROBYN.22912.01\Appeal\Reply Brief, Blackburn and Stoll (Rev).03032010.rlh.doc

# ADDENDUM A

Recorded at Request of _____

at _____ M. Fee Paid $_____

by _____ Dep. Book _____ Page _____ Ref. _____

Mail tax notice to JOHN HOGGAN Address 687 East 3rd AVE SLC, UT 84103

# QUIT-CLAIM DEED

ELIZABETH D JOLLEY AKA ELIZABETH D JOLLEY GARDNER

grantor

of SALT LAKE CITY, County of SALT LAKE, State of Utah, hereby QUIT-CLAIM to

grantee

ELIZABETH D JOLLEY AKA ELIZABETH D JOLLEY GARDNER and JOHN D HOGGAN, a married man, as joint tenants, but not as tenants in common, with full rights of survivorship

of SALT LAKE CITY, COUNTY OF SALT LAKE, STATE OF UTAH for the sum of OTHER GOOD AND VALUABLE CONSIDERATION AND TEN AND NO/100---------- DOLLARS,

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

COMMENCING AT THE SOUTHEAST CORNER OF LOT 1, BLOCK 53, PLAT "D", SALT LAKE CITY, SURVEY, AND RUNNING THENCE WEST 41.5 FEET; THENCE NORTH 7 RODS; THENCE EAST 41.5 FEET; THENCE SOUTH 7 RODS TO THE PLACE OF BEGINNING.

5147632

FIRST AMERICAN TITLE No. 24883

Witness the hand of said grantor, this 22nd day of OCTOBER, A. D. one thousand nine hundred and 91

Signed in the presence of

Elizabeth D Jolley aka Elizabeth D Jolley Gardner

STATE OF UTAH, County of SALT LAKE } ss.

On the 22nd day of OCTOBER A. D. one thousand nine hundred and 91 personally appeared before me Elizabeth D Jolley aka Elizabeth D Jolley Gardner

the signer of the foregoing instrument, who duly acknowledge to me that s he executed the same.

CAMILLE Notary Public STATE OF UTAH My Commission Expires

BK 63

5143632
23 OCTOBER 91 11:42 AM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
FIRST AMERICAN TITLE
REC BY: REBECCA GRAY , DEPUTY

BK6368PG

# ADDENDUM B

AFCU #238 12/90

AMERICA F[illegible]
CREDIT UN[illegible]

PLAINTIFF'S EXHIBIT 2

PENDO 800-631-6989

Account # 327223-4.

HOME E[illegible]
AGREEMENT, NOTE AN[illegible]ATEMENT Date 10/22/91

er's Name & Address: JOHN D HOGGAN and ROBYN [illegible]nd ELIZABETH D GARDNER

687 EAST 3RD AVENUE,

SALT LAKE CITY, UTAH 84103

| | | | |
|---|---|---|---|
| Index (See Section 14): | 5.5 % | Current Daily Periodic Rate: | .02548 % |
| l Above Index: | 3.8 % | Credit Limit: | $ 25,000.00 |
| nding ANNUAL PERCENTAGE RATE: | 9.3 %. | Last Advance Date: | 10/22/2001 |

your America First Home Equity Line Revolving Credit Agreement, Note, and Truth-In-Lending Disclosure Statement ("Agreement"). It spells out the l conditions of your variable rate revolving credit plan ("Account") with America First, as disclosed above. In this Agreement, the words "you" and "your" and all persons who sign this Agreement, and all persons who use the account, each and all of whom will be bound to the terms and conditions of ement. The words "we", "us", "our", and "Credit Union" mean America First Credit Union, Creditor.

Promise to Lend Money. Once this Agreement is executed, we agree to establish your Account with the Credit Limit shown above. We agree to make so long as the terms of this contract are being met.

y to Use Your Account. You can obtain advances by any method(s) the Credit Union authorizes from time to time. If authorized you can write a Home e check by using the special numbered checks that we will supply to you; or you can arrange for the transfer of funds from your Account into your ecking account. The full amount paid by us on each Home Equity Line check or transfer will be added to the outstanding principal balance of your s of the date of payment or transfer. We are not obligated to accept your Home Equity Line checks in payment of amounts that are due under your f more than one person can obtain loan advances under this Agreement, we will pay Home Equity Line checks or honor Account transfer requests ny of you, but if you make conflicting demands on us, we, at our option, may choose not to pay any Home Equity Line check or honor any Account quest. You agree to abide by any applicable terms and agreements in effect if you use Loan Checks, a VISA Debit Card, Automated Teller Machines, or other methods authorized by the Credit Union from time to time to access your account. No minimum advance amount is required.

Promise to Pay. The payments under this plan will vary according to your balance. The payment amount due is computed at 1.25% of the unpaid alance owing on the first day of each month, or $50 whichever is greater. Payments are due and payable by the 20th of each month. The first payment e 20th day of the month following the creation of your Home Equity Line. The payment computation formula may be increased in increments of .25% o prevent negative amortization of your principal balance. You will be given advance notice of any required changes in the payment computation u promise to pay all loan advances extended to you or to any other person authorized to use your Account, along with all finance charges and any and charges according to this Agreement. All payments must be made in U.S. dollars.

Advance Date; Final Payment Date. The last advance date shown is the last date that loan advances can be obtained on this account, unless future e cancelled earlier as provided in this Agreement. The final payment date may be many years after the last advance date, depending on whether ay more than the required payment. The final payment date is a function of the amount advanced, the interest rates, and the payment computation effect over the duration of the loan. If you desire to pay the balance off by the last advance date, you must discontinue additional advances, and g payment amounts greater than that required under the plan. Your payments must be sufficiently large to liquidate the outstanding balance plus rest. You realize that if during the term of your Home Equity Line Loan you make only the required payments, and do not make additional repayments hat the total amount outstanding at the last advance date may be significantly larger than any previous balance. You agree to continue making payments red during the draw period or greater, throughout the repayment period until the entire unpaid balance plus accrued interest has been paid in full. f the repayment period will depend on the balance owed at the end of the draw period.

Person Liable. If more than one person has signed or is otherwise bound by the terms of this Agreement, then each will be jointly and severally entire amount due under this Agreement.

ty. This Agreement is secured by a Deed of Trust ("Security Instrument") upon property (The "Collateral") which you own and now occupy and lo occupy as your principal residence. Which property is located at 687 EAST 3RD AVENUE, SALT LAKE CITY, UTAH 84103. The Security Instrument secures all future amounts under it up to and including the full amount of your Credit Limit. The Collateral, and our rights with respect to it, are more fully described in the Security Instrument.

y Insurance. Property insurance is required by us against loss or damage to the Collateral. Fire insurance coverage for all structures is required equal to the total available limits of all loans (regardless of lender) for which a security interest in the Collateral is outstanding. You must obtain such required insurance at your cost and expense in full force until the unpaid balance of your Account is paid in full and this Agreement is ter- d. Insurance may also be required by us against flood damage if the Collateral is in a flood danger area. If required, you are responsible for obtaining ng it. You may obtain property, fire and flood insurance from anyone you want who is acceptable to us. If you fail to provide insurance as required ment, the Credit Union can add the cost of insurance to protect its security interest.

edit Limit. Your Credit Limit is set forth above. We are not obligated to honor any Home Equity Line check or Account transfer request that would cipal balance of your Account to exceed the amount of your Credit Limit. We may elect to advance, however, the full amount of such Home Equity Account transfer and treat such advance as a loan advance under this Agreement without thereby increasing your Credit Limit. You agree to repay on demand any such advance, together with any applicable Finance Charge.

In Your Credit Limit. Your credit limit is set at a particular amount. New loan documentation must be signed and a three-day rescission period any funds above the original limit can be advanced.

ent. You may pay early and you may pay extra or larger payments without any penalty. However, any larger or additional payments will not relieve obligation to make the next succeeding minimum monthly payment when due.

Statements. Each month in which there is an outstanding balance on your Account, you will receive a monthly statement from us. The statement other things, your "New Balance," the minimum amount you must pay, when you must pay it, your current periodic rate, and your Annual Percen- agree to pay us the minimum payment due on or before the due date shown on your statement. The "New Balance" includes the outstanding e and other costs and charges according to this Agreement.

Charges on Daily Balance. The finance charge is the cost you pay for credit. The annual percentage rate does not include costs other than nce charge on each new advance begins on the date of the advance and continues until the advance has been repaid in full. The finance charge ng the "daily balance" method. To compute the finance charge, the unpaid balance for each day since your last payment (or since an advance al made a payment) is multiplied by the applicable daily periodic rate. The sum of these amounts is the finance charge listed. The balance used nance charge is the balance on your account each day after payments and credits have been subtracted and new advances and other debits l. Any unpaid finance charges are excluded in calculating the balance. There is no "free period" within which payments may be made in order oid Finance Charges.

Charge. You will pay a late fee on payments 16 da, or more delinquent. The late fee charged will be 4% of the nthly payment or a $4.00 minimum
ie maximum fee charged will not exceed $15.00.

iable Interest Rate. The line has a variable rate feature. The annual percentage rate (corresponding to the periodic rate) and the minimum monthly an change. The annual percentage rate includes only interest and not other costs. The interest rate for variable rate advances is based on the New al Reserve Discount Rate plus a margin. The index is determined quarterly by averaging the New York Federal Reserve Discount Rate on the third eaoh month in the preceding quarter and rounding it up to the next .5%. The interest rate on existing balances will be adjusted on the first day of ɔril, July and Oolober. The maximum interest rate will not exceed 21%. In the event that the maximum rate of 21% is reaohed, we have the right to r limit or to freeze your limit and prohibit any further advances. However, once the rate drops below the cap of 21%, your limit will be reinstated. The "Annual Percentage Rate" shown on the reverse side of this agreement is the rate in effect on the date of this agreement. This initial base rate may eaoh quarter according to the movement of the Federal Reserve Discount Rate. An increase or decrease in the index will increase or decrease your arge and may affect the minimum payment amount.

· Charges. Our annual maintenance fee is $50.00. We are currently waiving this fee. However, we have the right to charge this fee or a portion of e in the future. We also reserve the right to charge fees for stop payments and returned oheoks.

ılar Payments. We oan accept and deposit late payments or partial payments, or drafts, checks or money orders marked "payment in full" without :f our rights under this Agreement.

lt. We can terminate your line, require you to pay us the entire outstanding balance in one payment, and charge you certain fees if:

engage in fraud or material misrepresentation in connection with the line.
do not meet the repayment terms.
· action or inaction adversely affects the collateral or our rights in the collateral.

ng Your Limit. We can refuse to make additional extensions of credit or reduce your credit limit if:

value of the dwelling securing the line declines significantly below its appraised value for purposes of the line.
reasonably believe you will not be able to meet the repayment requirements due to a material change in your financial circumstanoes.
are in default of a material obligation in the agreement.
ernment action prevents us from imposing the annual percentage rate provided for or impairs our security interest such that the value of the interest ss than 120 percent of the credit line.
gulatory agency has notified us that continued advances would constitute an unsafe and unsound practice.
maximum annual percentage rate is reached.

ation of Your Account. If an event of termination occurs and we simultaneously or later declare in writing said event to be a default under this ıis Agreement shall terminate and amounts owing to us shall become due and payable in full. We may refuse to declare a particular event to be 'aive our right to do so, but our refusal to declare an event to be a default or waiver of our right to do so does not bind us if a similar or different later. At that time, we have the right to decide whether to declare that event to be a default. Our obligation to make advances will stop at the time ·itten declaration of default even if we have not notified you of that declaration prior to that time. If we declare a default, all sums due and owing count are due and payable. Upon default, you cannot use your Account and the default could result in the loss of your home, which is the Collateral ment, and/or judgment against you.

ation of Your Account by You. You may terminate your Account at any time by sending written notice to us and returning any outstanding Home ecks in your possession. The termination will be effective as soon as we can reasonably act to stop new advances from being made on your Account. ıill not be obligated to honor all Home Equity Line checks received by us before the termination becomes effective. In addition, we have the right :quired) to honor after termination all Home Equity Line checks dated before the termination becomes effective.

ɔf Equity Line Checks and VISA Debit Card. If your Account is terminated you agree to immediately return to us any Home Equity Line checks, ı" cards which we have previously provided to you. These items remain our property even in your possession.

Error Notice. See the attached statement for important information regarding your right to dispute a billing error.

ılc Fund Transfers. Telephone requests for advances, or transfers on your Account may be limited as required by the "Electronic Fund Transfers ıposed upon us by law. This regulation may also be applied to requests made through the "Accessline" audio response system.

ɔn Costs - Foreclosure. If this Agreement and/or the Security Instrument is referred to an attorney for collection, you agree to pay reasonable nd costs, whether or not a lawsuit is filed, and attorney fees and costs on appeal, as provided by law. If suit is filed for a deficiency judgment, ate will be the same as the contract rate. If suit is filed for a judgment, Weber County is the proper venue.

Sale. If you sell or transfer an interest in the property covered by the Security Instrument, we may terminate this Agreement and accelerate the ɔe of your Account, which means that all amounts owing to us shall become due and payable.

You agree to pay when due all federal, state or local taxes and other charges on the Collateral securing this Agreement. If you fail to do so, we quired taxes and add all expenses to your Account payable on demand at the interest rate then in effect.

of Terms. The terms of this Agreement may only be modified through the signing of a Change in Terms Agreement by all parties associated ment.

.oss. You will be bound by this Agreement even if the Collateral is damaged or destroyed.

ıction. The interest you pay on this loan may or may not be tax deductible. You agree to consult with the Internal Revenue Service or a tax 'mine what portion of the interest paid on the loan may be tax deductible.

ıeous. Our rules for stopping payment on ordinary checks will apply to stopping payments on Home Equity Line checks including the charge ınt fee. You will immediately notify us of any changes in your address. Upon our request, you will provide us with a financial or credit statement ıclory to us . A waiver of any terms or conditions in this Agreement by us is not a waiver of the same or of any other term or condition on any If any part of this Agreement is invalid, it shall not make any other provision of this Agreement invalid. You will immediately notify us in writing ·me Equity Line checks and VISA cards are lost or stolen or if an unauthorized person uses your Account. Notices will be sent to us at the address atest billing statement, to be effective upon receipt. Notices to you will be sent to your address as indicated on your last billing statement, to be nailed unless differently stated in the notice. If more than one person is bound to the terms of the agreement, a notice to any one of you will be f you except for notices that affect the right of rescission, which will be sent to each person affected.

greement. The undersigned have entered into a credit agreement with the credit union. The written agreement is a final expression of the agree- ıe undersigned and the credit union. This written agreement may not be contradicted by evidence of any oral agreement or alleged oral agreement. ł aoknowledge receiving a copy of this Notice and agree that the written credit agreement contains the terms applicable to the credit transaction.
NOWLEDGE RECEIPT OF THE ABOVE DISCLOSURE STATEMENT.

Borrowers:

[signature] ID# 512-23447

[signature] ID# 529-76-0871

[signature] ID# 528-24-5895

ID#

[signature]
Credit Union Authorized Representative

PARCEL NUMBER 09-32-316-024-0000

WHEN RECORDED, MAIL TO:
AMERICA FIRST CREDIT UNION
P.O. Box 9199 Ogden, Utah 84409

5143633
23 OCTOBER 91 11:42 AM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
FIRST AMERICAN TITLE
REC BY: REBECCA GRAY , DEPUTY

# HOME EQUITY LINE
# TRUST DEED

S DEED OF TRUST CONTAINS A DUE-ON-SALE PROVISION AND SECURES INDEBTEDNESS UNDER A CREDIT REEMENT WHICH PROVIDES FOR A REVOLVING LINE OF CREDIT AND A VARIABLE RATE OF INTEREST.

S TRUST DEED, made this 22nd day of OCTOBER, 19 91, between

ELIZABETH D JOLLEY aka ELIZABETH D JOLLEY GARDNER and

JOHN D HOGGAN, a married man, as joint tenants ,as TRUSTOR, whose address is

687 EAST 3RD AVENUE, SALT LAKE CITY, UTAH 84103
(Street and Number) (City) (State)

TIMOTHY W BLACKBURN, attorney at law , as TRUSTEE, and
ICA FIRST CREDIT UNION a Utah Corporation, as BENEFICIARY,

NESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the

g described property, situated in SALT LAKE County, State of Utah:

2-316-024

Lot 1 COMMENCING AT THE SOUTHEAST CORNER OF LOT 1, BLOCK 53, PLAT "D", SALT LAKE CITY, SURVEY, AND RUNNING THENCE WEST 41.5 FEET; THENCE NORTH 7 RODS; THENCE EAST 41.5 FEET; THENCE SOUTH 7 RODS TO THE PLACE OF BEGINNING.

estate, right, title and interest, including insurance, which Trustor now has or may hereafter acquire, either in law or in equity in and to said premises; to same, together with the buildings and improvements thereon and all alterations, additions or improvements now or hereafter made thereto, including all s and fixtures now or hereafter installed or placed in said buildings or on said real property for the generation or distribution of air, water, heat, electricity, lon or for ventilating or air conditioning purposes, or for sanitary or drainage purposes, and including stoves, ranges, cabinets, awnings, window shades, ry rods and brackets, screens, floor coverings (including all rugs and carpets attached to floors) and all other similar items and things; all of the items d and all other similar items or things, whether now or hereafter placed on the property, being hereby declared to be, and in all circumstances, shall be d in connection with the purposes and powers of the Trust Deed, things affixed to and a part of the really described herein; the specific enumerations e general, and together with all singular lands, tenements, hereditaments, reversion(s), remainder(s), privileges, water rights and appurtenances of every nto belonging or in any way appertaining to, or which may be hereafter acquired and used or enjoyed with, said property, or any part thereof.

E OF SECURING (1) payment of all obligations now or hereafter pursuant to or otherwise related or connected to that certain "Home Equity Line Disclosure Statement" of even date herewith executed by the Trustor) the "Agreement"), which Agreement evidences a revolving credit line in the of TWENTY FIVE THOUSAND DOLLARS AND NO CENTS----------

)0.00**) together with interest, costs, and expenses, as therein provided, payable to the order of Beneficiary at the time, and in the st as therein set forth, together with any extensions, renewals, modifications, and future advances thereof or thereunder; (2) the performance of tor herein contained; (3) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms of this Trust Deed and/or r with interest thereon as provided therein.

BK6358PG1

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| JONES & TREVOR MARKETING, INC.,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>FINANCIAL DEVELOPMENT SERVICES, INC., JEREMY WARBURTON, JOHN NEUBAUER, JONATHAN L. LOWRY, NATHAN KINSELLA, and ESBEX.COM, INC.,<br><br>Defendants/Appellees. | **REPLY BRIEF OF APPELLANT**<br><br>Case No. 20080904 |

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Derek P. Pullan and the Honorable David N. Mortensen

EARL JAY PECK (2562)
R. CHRISTOPHER PRESTON (9195)
**SMITH HARTVIGSEN, PLLC**
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Telephone (801) 413-1600
Facsimile (801) 413-1620
*Attorneys for Defendants/Appellees*

STEPHEN QUESENBERRY (8073)
JESSICA GRIFFIN ANDERSON (11500)
**HILL, JOHNSON & SCHMUTZ, L.C.**
4844 North 300 West, Suite 300
Provo, Utah 84604
Telephone (801) 375-6600
Facsimile (801) 375-3865
*Attorneys for Plaintiff/Appellant*

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| JONES & TREVOR MARKETING, INC.,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>FINANCIAL DEVELOPMENT SERVICES, INC., JEREMY WARBURTON, JOHN NEUBAUER, JONATHAN L. LOWRY, NATHAN KINSELLA, and ESBEX.COM, INC.,<br><br>Defendants/Appellees. | **REPLY BRIEF OF APPELLANT**<br><br>Case No. 20080904 |

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Derek P. Pullan and the Honorable David N. Mortensen

EARL JAY PECK (2562)
R. CHRISTOPHER PRESTON (9195)
**SMITH HARTVIGSEN, PLLC**
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Telephone (801) 413-1600
Facsimile (801) 413-1620
*Attorneys for Defendants/Appellees*

STEPHEN QUESENBERRY (8073)
JESSICA GRIFFIN ANDERSON (11500)
**HILL, JOHNSON & SCHMUTZ, L.C.**
4844 North 300 West, Suite 300
Provo, Utah 84604
Telephone (801) 375-6600
Facsimile (801) 375-3865
*Attorneys for Plaintiff/Appellant*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Utah Cases



### Statutes



### Other Authorities



### Treatises

## ARGUMENT

The trial court in this case incorrectly granted Lowry and Kinsella's motion for summary judgment.

### I. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE J&T PRESENTED EVIDENCE SUFFICIENT TO RAISE GENUINE ISSUES OF FACT.

The trial court incorrectly found that there were no issues of material fact as to Plaintiff/Appellant Jones & Trevor Marketing ("J&T")'s claims against Defendants/Appellees Jonathan L. Lowry and Nathan Kinsella ("Lowry and Kinsella"). Under the Utah Rules of Civil Procedure, a court may not grant summary judgment unless the moving party establishes "[1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c).

Despite Lowry and Kinsella's assertions to the contrary, the nonmoving party is not required to "prove" its case in order to defeat the motion but rather must simply present evidence "sufficient to raise a genuine issue of fact." *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993). Again, the court's function in assessing a motion for summary judgment is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court's "sole inquiry should be whether material issues of fact exist." *Draper City v. Est. of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

J&T met its burden of raising genuine issues of material fact, and summary

judgment was therefore in appropriate. Further, J&T presented evidence sufficient to establish a prima facie case for its theory of alter ego, as well as for each of the intentional torts asserted against Lowry and Kinsella. *See* Brief of Appellant, pp. 11-23.

Finally, it should be noted that fraud claims are generally not suitable for disposition via summary judgment. Utah courts have repeatedly held that fraud claims are generally considered heavily fact-specific and therefore "unsuited for summary judgment." *See, e.g., Colosimo v. Roman Catholic Bishop*, 2007 UT 25, P44, 156 P.3d 806; *Wasatch Oil & Gas, L.L.C. v. Reott*, 2007 UT App 223, ¶ 33, 163 P.3d 713. Much of J&T's case against Lowry and Kinsella rests on fraud claims, including alter ego, constructive fraud, fraudulent nondisclosure, and fraudulent misrepresentation. (R. 1021-1044.) And, as is typical of such claims, they are heavily fact-specific. J&T should have the opportunity to present the evidence of such claims to a fact-finder, rather than to have them disposed of in a summary judgment.

On appeal, this Court "views the evidence and all reasonable inferences thereon in the light most favorable to the appellant" – in this case, J&T. *Kleinert*, 854 P.2d at 1026. In addition, this Court reviews a trial court's grant of summary judgment de novo. *Poteet v. White*, 2006 UT 63, ¶7, 147 P.3d 439. J&T therefore respectfully requests that this Court reverse the trial court's decision because J&T presented evidence sufficient to raise genuine issues of fact with regard to both its alter ego theory and its intentional tort claims.

### A. J&T Presented Evidence Sufficient To Raise Genuine Issues Of Fact With Respect To Its Alter Ego Theory.

The trial court incorrectly granted Lowry and Kinsella's motion for summary judgment on J&T's alter ego theory.

J&T presented evidence on a number of the unity of interest factors, sufficient to withstand Lowry and Kinsella's motion for summary judgment. As has been stated, Utah courts use the following factors to determine whether there is a unity of interest between individuals and a corporation:

> (1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) non-functioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a façade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

*Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987). Again, it should be noted that the above factors are not conclusive or exclusive and not all factors need to be present in order to find a unity of interest. *See, e.g., id.*

J&T presented evidence on several of the factors to show that there was a unity of interest between Lowry and Kinsella and their two entities, Financial Development Services, Inc. and Esbex.com, Inc.[1]

First, J&T presented evidence that Lowry and Kinsella's entities were

---

[1] J&T is not sure what specific references to the record Lowry and Kinsella believe do not correspond with J&T's arguments. J&T sought to site to the record as accurately as possible, relying on the Judgment Roll and Index prepared by the lower court.

undercapitalized. In addition to the fact that both entities became insolvent in a relatively short amount of time, there is evidence that the entities had insufficient funds to meet their obligations – because of the actions of Lowry and Kinsella. J&T presented evidence that Lowry and Kinsella took money from FDS and Esbex to fund their personal interests, in disregard of the money needed to satisfy customers and to run the corporations. (R. 1300-03, 1642-46.) In addition, there is evidence that Lowry and Kinsella knew that they were taking money earmarked for J&T customer refunds. (R. 1301, 1643-44.) This evidence shows that the entities were likely undercapitalized.

Second, J&T presented evidence that Lowry and Kinsella failed to observe corporate formalities. There is evidence that Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting. (R. 1301, 1643.) In addition, Lowry and Kinsella presented no evidence that they did properly account for such items, or that there was appropriate payment and accounting of dividends.

Third, J&T presented evidence of siphoning of funds by dominant stockholders. As mentioned above, there is evidence that Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting. (R. 1301, 1643.) Further evidence showed that Lowry and Kinsella took money from FDS and Esbex to fund their personal interests, in disregard of the money needed to run the corporations. (R. 1300-03, 1642-46.) Finally, there is also evidence that Kinsella took money from FSD without telling Lowry. (R. 1302, 1644-45.)

Finally, J&T presented evidence that the corporate entities were used by Lowry and Kinsella to promote fraud or injustice against J&T. When customers returned J&T products, Lowry and Kinsella kept the refund from J&T and, instead of sending the product back to J&T, resold the product to new customers. (R. 1300, 1303-04, 1642.) J&T submitted evidence that Lowry and Kinsella knew that they were taking money earmarked for J&T customer refunds, (R. 1301, 1643-44.) and that after FDS terminated the agreement with J&T, Lowry and Kinsella made the decision to continue selling coaching, to instruct their employees not tell J&T about it, and to keep the money derived from the sales. (R. 1300, 1302, 1641-42.)

J&T presented sufficient evidence to create a genuine issue of fact as to whether the unity of interest prong of the alter ego theory was met. In addition, J&T submitted evidence, not considered by the trial court, that the observation of the corporate forms would sanction fraud, and an unjust, inequitable result would follow.

In this case, there was sufficient evidence to demonstrate that allowing Lowry and Kinsella to hide behind the corporate shield would result in an injustice to J&T. Observing the corporate form in this case would sanction the fraud committed by both Lowry and Kinsella. Both FDS and Esbex were clearly undercapitalized, as demonstrated by the short life spans of the two entities, the admission that the two entities were insolvent, and Lowry and Kinsella's penchant for taking money from the corporation without first satisfying the corporations' financial obligations. (R. 1640-59.) Further, since FDS and Esbex were dissolved several years ago, Plaintiff has no other recourse for

the wrongs he suffered as a result of the actions of Lowry and Kinsella. In any event, there was sufficient evidence of potential injustice, combined with the above failure to observe corporate formalities, to prevent the court from granting Lowry and Kinsella's motion for summary judgment.

### B. J&T Presented Evidence Sufficient To Raise Genuine Issues Of Fact With Respect To Its Intentional Tort Claims Against Lowry And Kinsella.

The trial court incorrectly held that no personal liability could attach to Lowry and Kinsella for the torts they allegedly committed. The Utah Supreme Court has noted with regard to fraud: "a director or officer of a corporation is individually liable for fraudulent acts or false representations of his own or in which he participates, even though his action in such respect may be in furtherance of the corporate business." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 19, 70 P.3d 35 (quoting 37 Am. Jur. 2d *Fraud and Deceit* § 322 (1968)). Thus, though Lowry and Kinsella may have been acting in furtherance of their entities, they can still be held personally liable for torts in which they participated.

J&T presented evidence sufficient to raise genuine issues of fact as to whether Lowry and Kinsella personally committed the following torts in connection with the J&T contract: theft by conversion, constructive fraud, fraudulent nondisclosure, intentional interference with business relations, and fraudulent misrepresentation.

#### 1. Theft by Conversion

J&T presented evidence sufficient to withstand summary judgment with respect to

its theft by conversion claim against Lowry and Kinsella. In its initial brief, J&T set forth the elements of a theft by conversion claim and restated the evidence in support of its claim. One point of clarification should be added. The issue of whether J&T had an immediate right to payments for coaching and to its customer lists and leads is a question of contract interpretation. Lowry and Kinsella assert that they believed coaching was not covered by the contract. (R. 1644.) J&T asserts that coaching was covered. (R. 1318.) Also, there is an issue of fact as to whether Lowry's July 2002 letter terminated the contract and whether that contract gave J&T the immediate right to possession of its customer lists and leads. In light of these issues of fact and law, summary judgment on J&T's theft by conversion claim was inappropriate.

### 2. Constructive Fraud/Fraudulent Nondisclosure

J&T presented evidence sufficient to withstand summary judgment with respect to its constructive fraud and fraudulent nondisclosure claims against Lowry and Kinsella. In its initial brief, J&T set forth the elements of its constructive fraud claim and its fraudulent nondisclosure claim and restated the evidence in support of those claims.

For the constructive fraud claim, Lowry and Kinsella had a confidential relationship with J&T. In *Kuhre v. Goodfellow*, the court defined a "confidential relationship":

> A confidential relationship arises when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party. This doctrine rests upon the principle of inequality between the parties.

2003 UT App 85, ¶ 18, 69 P.3d 286 (internal citations omitted); *see also Gold Standard,*

*Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1064 (Utah 1996).

In a case remarkably on point, the court in *Strickland v. Arnold Thomas Seed Service, Inc.*, 560 P.2d 597 (Ore. 1977), found that the defendant agent owed the plaintiff a fiduciary duty. In *Strickland*, the plaintiff (an alfalfa seed farmer) and the defendant (a seed broker) entered into a written contract whereby the broker sold plaintiff's seed in a pool of other alfalfa farmers. *Id.* at 598. The agreement provided that the broker had the right to possession and control of the seed, and the sole right to determine the times and prices at which the seed would be sold. Further, the broker agreed to use its best efforts in marketing the plaintiff's seed. *Id.* at 599-600. Based on this, the *Strickland* court found a duty flowing from the broker to the plaintiff:

> The marketing agreement gave [the broker] control over the pool members' seed, including the sole power to determine the price, dates, and terms of sales. The pool members had no control over any marketing decisions and, indeed, were not kept informed of those decisions. The pool members surrendered to [the broker] complete control over their crops, and were entitled to expect that [the broker] would exercise that control according to the highest standards applicable to a fiduciary.

*Id.* at 600. In the present case, J&T gave control to Lowry and Kinsella over its customer names and contact information. (R. 1029-1044.) Also, Lowry and Kinsella had the sole power to determine the price, dates and terms of sale. *Id.* Further, J&T had no control over any marketing decisions and indeed was not kept informed of those decisions. *Id.* And J&T was therefore entitled to expect that Lowry and Kinsella would exercise control over J&T's products, lists, and reputation according to the highest standards applicable to a fiduciary.

Accordingly, a confidential relationship existed between the parties. And, as a result of this confidential relationship, Lowry and Kinsella had a legal duty to communicate with J&T, which is an element of J&T's fraudulent nondisclosure claim. Because a confidential relationship existed between the parties, or at least there was a genuine issue of fact as to whether a confidential relationship existed between the parties, summary judgment on J&T's constructive fraud and fraudulent nondisclosure claims was inappropriate.

### 3. Intentional Interference with Business Relations

J&T presented evidence sufficient to withstand summary judgment with respect to its intentional interference with business relations claim against Lowry and Kinsella. In its initial brief, J&T set forth the elements of its intentional interference with business relations claim and restated the evidence in support of its claim. One fact in addition to those set forth in the opening brief should be highlighted.

J&T presented evidence that, after Mr. Lowry sent the termination letter on July 19, 2002, Lowry and Kinsella continued to sell J&T's products and use J&T's leads. (R. 1323-1567.) Specifically, Lowry and Kinsella contacted several of J&T clients several months after the July 2002 termination letter, and Lowry and Kinsella used J&T's names and customers as testimonials on Exbex.com. *Id.* This continued use of J&T's proprietary information was principally calculated to both benefit Lowry and Kinsella and damage J&T's reputation and future business interests. In light of the issues of fact raised by J&T, summary judgment on this claim was improper.

### 4. Fraudulent Misrepresentation

J&T presented evidence sufficient to withstand summary judgment with respect to its fraudulent misrepresentation claim against Lowry and Kinsella. In its initial brief, J&T set forth the elements of its fraudulent misrepresentation claim and restated the evidence in support of its claim.

Specifically, J&T presented evidence that Lowry represented that FDS canceled its contract with J&T and that FDS was ceasing to sell J&T's products as of July 19, 2002. (R. 2342-2343.) The contract provides that upon termination, FDS is to "immediately cease: (i) any contact with Jones' leads; (ii) selling Jones' products; (iii) in any way representing to any party that it is a seller of Jones products; and (iv) the use of Jones' trademarks service marks or other Confidential Information." (R. 2348-2349.)

J&T presented evidence, that at the time the representation was made on July 19, 2002 that the contract was terminated, neither Lowry nor Kinsella intended to keep the contract provisions just then brought into play by the termination. J&T presented evidence that, after the termination letter was sent on July 19, 2002, Lowry and Kinsella did in fact continue to sell J&T's products and use J&T's leads. (R. 1323-1567.) Specifically, Lowry and Kinsella contacted several of J&T clients several months after the July 2002 termination letter, and Lowry and Kinsella used J&T's names and customers as testimonials on Exbex.com. *Id.*

In sum, J&T presented evidence that Lowry and Kinsella personally committed fraud and other torts with respect to the contract with J&T. Such evidence was sufficient

to present a genuine issue of material fact as to whether Lowry and Kinsella should be held personally liable for the torts in which they participated.

## II. THE ECONOMIC LOSS RULE DOES NOT PROVIDE THIS COURT WITH AN INDEPENDENT BASIS ON WHICH TO AFFIRM THE TRIAL COURT'S RULINGS.

The economic loss rule does not prohibit J&T's recovery in this case. Lowry and Kinsella's recitation of the case law on the economic loss rule is generally correct. However, their definition of the rule left out an essential element. The economic loss rule means that "one may not recover 'economic' losses under a theory of *non-intentional tort*." *Am. Towers Assoc., Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1189 (Utah 1996) (emphasis added). "In other words, economic damages are not recoverable in negligence . . . ." *Id.*

In this case, the only torts pleaded by J&T against Lowry and Kinsella were intentional torts: theft by conversion, constructive fraud, fraudulent nondisclosure, intentional interference with contractual relations, and fraudulent misrepresentation. (R. 1021-1044.) J&T asserted no negligence claims against Lowry and Kinsella. *Id.* Thus, the economic loss rule does not apply to this case and does not give this Court an independent basis on which to affirm the trial court's rulings.

## CONCLUSION

Therefore, in light of the foregoing, this Court should reverse the trial court's grant of partial summary judgment in Lowry and Kinsella's favor and remand this case back to the trial court for trial on the merits.

RESPECTFULLY SUBMITTED this 7th day of August 2009.

HILL, JOHNSON & SCHMUTZ, LC

/s/ Jessica Griffin Anderson
Stephen Quesenberry
Jessica Griffin Anderson
*Attorneys for Plaintiff/Appellant*

## PROOF OF SERVICE

I hereby certify that, on the 7th day of August 2009, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed, postage prepaid, to the following:

Earl Jay Peck
Steven H. Stewart
R. Christopher Preston
SMITH HARTVIGSEN, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111

/s/ Lauren Farrer