2001

Kenneth L. Rothey v. Walker Bank and Trust Company aka First Interstate Bank of Utah : Reply Brief

Utah Supreme Court

Poole, Cannon & Smith; Duane R. Smith; Attorneys for Respondent.
Rooker, Larsen, Kimball & Parr; Bruce A. Maak; Thomas B. Green; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH L. ROTHEY, Trustee of
the Belnap Family Trust,

Respondent and Plaintiff,

vs.

WALKER BANK & TRUST COMPANY,
aka FIRST INTERSTATE BANK OF
UTAH, a Utah banking corporation,

Appellant and Defendant. Case No. 19570

FIRST INTERSTATE BANK OF UTAH,
a Utah banking corporation,

Appellant and
Counterclaim Plaintiff,

vs.

KENNETH L. ROTHEY, Trustee of
the Belnap Family Trust,
BARBARA SINE, JAYNIE BELNAP,
LeGRANDE P. BELNAP, ARLENE B.
WALDRON, LESLIE W. KING, PETTY
INVESTMENT COMPANY, PETTY MOTOR
COMPANY, RACHEL LUNT, DORIS
BAGLEY BELNAP, and FIRST SECURITY
BANK OF UTAH, N.A.,

Respondents and
Counterclaim Defendants.

REPLY BRIEF OF APPELLANT-DEFENDANT

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Kenneth Rigtrup, Judge

POOLE, CANNON & SMITH
Duane R. Smith
Prowswood Plaza, Suite 210
4885 South 900 East
Salt Lake City, Utah 84117
Attorneys for Respondent-
Plaintiff

ROOKER, LARSEN, KIMBALL & PARR
Bruce A. Maak, Of Counsel
Thomas B. Green
185 South State, Suite 1300
Salt Lake City, Utah 84111
Attorneys for Appellant-
Defendant

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Bruce A. Maak, Of Counsel
Thomas B. Green
185 South State, Suite 1300
Salt Lake City, Utah 84111
Attorneys for Appellant-
Defendant

TABLE OF CONTENTS

AUTHORITIES CITED

Statutes

Page No(s).

Cases

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Appellant First Interstate Bank of Utah, formerly named Walker Bank & Trust Company (hereinafter referred to as the "Bank"), respectfully submits this Reply Brief in answer to the new matters set forth in the brief of plaintiff-respondent Kenneth L. Rothey as Trustee of the Belnap Family

Trust (hereinafter referred to as "Rothey"). As in its Brief, the Bank will refer to the governing documents as follows: The promissory note evidencing the Bank's May 13, 1963, loan of $30,000.00 to Utahna P. Belnap is the "Note", and the trust deed securing the Note is the "Trust Deed"; the two lawsuits brought by LeGrande L. Belnap during the probate of the estate of Utahna P. Belnap which attacked the validity of his wife's title to the property covered by the Trust Deed and the Trust Deed itself are referred to as the "Actions".

POINT I

THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BASED ON PRINCIPLES OF RES JUDICATA

A. Rothey has not Cross-Appealed and is Consequently Barred from Contending that the Trial Court Erred in Rejecting Rothey's Res Judicata Defense.

The Bank has appealed from the trial court's judgment that, due to the Bank's alleged failure timely to advise Rothey or his predecessors of certain attorney's fees and costs incurred in the Actions, the Bank is estopped from collecting such fees as a part of the obligation secured by the Trust Deed. (Conclusions No. 6 and 7; R. 348). The Bank's Brief is largely concerned with demonstrating that the theory created by the trial court was neither pleaded nor argued by Rothey, that the trial court's theory is contrary to law and good sense, that no evidence supports the trial

court's findings, and that the trial court made no finding, and no evidence establishes the essential requirement, that Rothey or his predecessors relied in any respect upon the Bank's conduct. Despite the fact that the trial court entered judgment based on its unpleaded, unprecedented, and unsupported estoppel theory -- and despite the fact that the Bank's brief necessarily concerns itself with demonstrating the trial court's error in relying on such a theory -- Rothey begins Point I of his brief with the following proposition: "Clearly the primary thrust of the arguments of the Bank is that since Respondent did not specifically plead the defense of res judicata, there can be no bar to recovery by the Bank on that basis."[1] Brief of Respondent-Plaintiff, at 11. Rothey then goes on to argue at length that the doctrine of res judicata operates to bar the Bank's recovery of the disputed attorney's fees. Id., at 11-17. Rothey's attempt to circumvent the real issue in this case is unavailing.

Rothey concedes that, in violation of the explicit command of Rule 8(c), Utah Rules of Civil Procedure, he never pleaded res judicata as an affirmative defense in this case. Brief of Respondent-Plaintiff, at 11. The best that Rothey can state is that he "did plead facts constituting res judicata." Id. In fact, however, Rothey's reply to the Bank's

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[1] Rothey's emphasis, as a basis for affirmance, on a theory rejected by the trial court, is peculiar, but understandable.

counterclaim, (R. 78-81), can be searched in vain for any theory even remotely resembling the res judicata argument that Rothey now urges. Similarly, Rothey failed to identify this theory when asked by interrogatory to "state each fact supporting or providing the basis for the allegations" contained in his defenses to the Bank's counterclaim. (R. 152-154). Accordingly, when Rothey attempted to present his res judicata theory at trial, the Bank interposed a continuing objection. (T., 2/7/83, at 107-108; R. 478; T., 2/8/83, at 91-92; R. 587-588). The trial court ultimately agreed with the Bank's objection to Rothey's attempt to raise his res judicata defense and, after both parties had presented their evidence, ruled as follows:

> It would have been wisdom on my part and would have saved wear and tear on the Court and wear and tear on the court reporter and expense to your clients when you appeal my order to the Supreme Court to have announced that this is not a case of res judicata, there having been no affirmative defense raised and the Court not having received a motion nor granted a motion about res judicata.

(T., 2/8/83, at 118; R. 614) (emphasis added). Thus, the trial court expressly ruled that Rothey had not raised the affirmative defense of res judicata and that that defense could not be considered.

Under these circumstances, Rothey cannot now be heard to support the trial court's ruling on the basis of an affirmative defense which the trial court expressly rejected.

The absence of a cross-appeal from Rothey challenging that finding of the trial court precludes Rothey from making such an argument here.

Walters v. First Federal Savings and Loan Association of Phoenix, 131 Ariz. 32, 641 P.2d 235 (1982), is directly on point. The plaintiffs in that case sued defendant for damages in connection with the purchase of an apartment complex. The plaintiffs had been involved in a previous lawsuit involving the same apartment complex. The plaintiffs were unsuccessful in that prior lawsuit. The jury in the second lawsuit returned a verdict in favor of the defendant and the plaintiffs appealed. On appeal, the defendant argued at length, apparently relying on the fact of the plaintiffs' loss in the prior lawsuit, that the plaintiffs' claims were barred by the doctrine of collateral estoppel. The Arizona Supreme Court rejected the defendant's argument and stated as follows:

> At the outset, we reject [the defendant's] contention, argued at length and repeated numerous times throughout its brief, that all of plaintiffs' substantive claims are barred by the doctrine of collateral estoppel. We do not reach the merits of this defense because [the defendant] should have raised this contention by way of a cross-appeal.
>
> In the absence of a cross-appeal, the appellee can defend only as to the arguments allowed in the trial court and cannot present rejected claims in an answering brief. Because [the defendant] seeks to assert a defense which was not permitted in the trial court, a cross-

appeal should have been filed ....
641 P.2d, at 238 (emphasis added).

The same rule was stated by the court in Cooper v. Albuquerque National Bank, 75 N.M. 295, 404 P.2d 125, 133 (1965): "[T]he rule is that findings of fact unfavorable to appellee, not attacked by cross-appeal, must stand." See Terry v. Zions Cooperative Mercantile Institution, 617 P.2d 700 (Utah 1980); Federal Land Bank of Berkeley v. Sorenson, 101 Utah 305, 121 P.2d 398, 401 (1942).

Under these precedents, Rothey cannot argue, as he does at page 14 of his brief, "that the defense of res judicata acts to bar the recovery of the disputed attorney's fees here at issue and that the trial court erred in not making such a ruling." (Emphasis added). The trial court found specifically that Rothey had not pleaded the defense of res judicata. If Rothey wishes to disagree with that finding before this Court, he must do so by way of a cross-appeal. The time for cross-appealing under Rule 75(d), Utah Rules of Civil Procedure, having passed, this Court cannot properly consider Rothey's challenge to the trial court's ruling. See Terry v. Zions Cooperative Mercantile Institution, 617 P.2d 700 (Utah 1980).

B. The Bank's Claim to the Attorney's Fees at Issue is not Barred by the Doctrine of Res Judicata.

Assuming arguendo that Rothey can properly assert a res judicata defense, the doctrine of res judicata has no

application to this case. In order for the affirmative defense of res judicata to succeed, its proponent must show (a) the existence of a prior suit between the same parties and (b) that the prior suit involved the same cause of action. Searle Brothers v. Searle, 588 P.2d 689, 690 (Utah 1978). Rothey's res judicata theory fails to satisfy either prerequisite. Neither of the Actions were between the parties to this lawsuit. More importantly, neither of the Actions concerned a cause of action even similar to, much less "the same as," the issues presented in this lawsuit.

First, for res judicata to apply, the prior action must be between the same parties as the parties to the present action. Rothey does state that the parties to the Actions "were the same as, or in privity with, the parties to this action." Brief of Respondent-Plaintiff at 15-16. However, Rothey provides absolutely no support for this conclusion. The parties to the Actions (LeGrande L. Belnap and the Bank) are plainly not the same as the parties to this lawsuit (Rothey and the Bank). Rothey has not demonstrated the existence of any privity between LeGrande L. Belnap and himself.

Rothey's res judicata defense must also fail because the Actions did not involve the same cause of action as this case. The Actions "were either a direct or indirect attack by Mr. Belnap on either the validity of the title of

the reputed owner, Utahna Belnap, to the property covered by the Trust Deed or an attack on the integrity of the underlying security document, namely the Trust Deed." (Finding No. 4; R. 341). Neither of the Actions upon which res judicata is based concerned an effort to recover the amounts secured by the Trust Deed or to foreclose the Trust Deed, as does this case. Indeed, the Bank did not even have a personal claim against LeGrande L. Belnap for recovery of its attorney's fees incurred under the Trust Deed, to which Mr. Belnap was not a party. The Bank's only recourse, as far as Mr. Belnap was concerned, was against the property secured by the Trust Deed, in which Belnap claimed an interest. Furthermore, Utah's one action rule, Utah Code Annotated, Section 78-37-1 (Repl. 1977), would preclude an action to recover a personal judgment for attorney's fees secured by a trust deed prior to foreclosure of the trust deed itself. Bank of Ephraim v. Davis, 581 P.2d 1001, 1003 (Utah 1978).[2] Foreclosure of the Trust Deed would, of course, require the

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[2] Rothey's theory of res judicata, when read in conjunction with the one action rule, would have the obviously incorrect consequence of forcing the Bank judicially to foreclose its Trust Deed in the Actions to recover the attorney's fees at issue, rather than pursuing a non-judicial trustee's sale procedure, which the trust deed statute explicitly allows. Utah Code Annotated, Section 57-1-23 (Repl. 1974).

joinder of those holding junior interests in the subject property, who were not parties to the Actions, but who were necessarily joined as parties defendant to the Bank's counterclaim in this case. (R. 55, paragraph 3; R. 56, paragraph 10).

The foregoing serves to highlight the ridiculous character of Rothey's belated and unpleaded res judicata defense. The Actions concerned the validity of the Trust Deed; this case concerns the recovery of amounts secured by the Trust Deed -- the two are plainly different causes of action. The Bank's right to claim its attorney's fees incurred in connection with the Actions was not at issue in the Actions, nor is there any evidence that the Trust Deed should, or even could, have been foreclosed at the time of the Actions.

Schaer v. State, 657 P.2d 1337 (Utah 1983), demonstrates that res judicata is inapplicable here. The plaintiff in Schaer instituted suit for a declaratory judgment that a certain road, the "dugway road," on his property was a highway dedicated to the public use. The State defended on the ground of the res judicata effect of a prior lawsuit. The prior lawsuit involved the same plaintiff and the State's condemnation of land contiguous to the dugway road. The trial court rejected the State's res judicata argument and this Court affirmed. This Court rejected the State's res judicata argument with the following statement:

> [W]e have determined that res judicata is not applicable to the present case because it is based on a different claim, demand, or cause of action than that of the [prior] litigation. The two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action. Moreover, the evidence of the two causes of action relates to the status of the property in two completely different and separate time periods. Thus, the doctrine of res judicata does not apply to preclude the plaintiff from maintaining his present cause of action. 657 P.2d, at 1340.

The Court's reasoning in Schaer applies here to bar Rothey's attempt to attach res judicata effect to the Actions. The Actions did not in any respect involve the Bank's right to recover attorney's fees under the Trust Deed or the amount of such fees.

Commercial Bank of Spanish Fork v. Spanish Fork South Irrigation Co., 107 Utah 279, 153 P.2d 547 (1944), is also apposite. The dispute in that case revolved around the defendant irrigation company's issuance of two different stock certificates representing the same share in the company. The plaintiff, the holder of one of the certificates, first brought a mandamus action to compel the defendant to issue a new certificate. The court in that action ruled that the plaintiff's certificate was void and conferred upon the holder no rights as a stockholder. The plaintiff brought a second suit against the defendant for the value of the stock purportedly represented by the void certificate.

The defendant defended, in part, on the ground that the prior mandamus action precluded the plaintiff's second action under the doctrine of res judicata. The trial court rejected the defendant's argument and this Court affirmed, stating:

> The rights claimed in this suit, although growing out of the same subject matter, gave rise to a distinct or separate cause of action and were not put in issue in the former suit. Furthermore, the questioned issues in this suit are neither germane to nor essentially connected with the actual issues raised in the mandamus proceedings. In such cases the doctrine of res adjudicata is not applicable. 153 P.2d, at 551 (emphasis added).

The facts here are closely analogous to those of Commercial Bank. The first suit in Commercial Bank determined whether plaintiff was entitled to a certificate, while here the Actions determined that the Bank held a valid Trust Deed. The second suit in Commercial Bank sought damages for defendant's failure properly to issue the certificate, while this case seeks to recover fees and costs under the now judicially validated Trust Deed. Res judicata is inapplicable here for the same reason.

Finally, Rothey has failed to come to grips with the absurd consequences of his position on res judicata. In order to accept Rothey's argument that the Actions operate to bar the Bank's recovery of the attorney's fees as part of its foreclosure under the Trust Deed, the Court must rule that every time a holder of a trust deed is joined in an action concerning either the property covered by a trust deed or the

trust deed itself, he must foreclose at that time in order to protect his right to claim attorney's fees incurred in connection with such an action[3] as part of the indebtedness secured by the trust deed. In effect, the holder of the trust deed would be legally coerced into foreclosing against his will -- a nonjudicial trustee's sale would be barred by res judicata. Such a preposterous result is not contemplated under the doctrine of res judicata.

POINT II.

ROTHEY'S DEFENSE OF THE TRIAL COURT'S JUDGMENT IS NOT PERSUASIVE

The second portion of Rothey's Brief attempts to support the trial court's judgment on its own terms. Rothey stumbles at the outset, however, over the unarguable fact that he neither pleaded nor argued the estoppel theory created by the trial court to support its judgment. The best face that Rothey can put on his failure to plead or argue the trial court's theory is the fact that Rothey's Fourth Defense to the Bank's counterclaim stated as follows:

> The Defendant has waived and/or is estopped to claim, as a part of the foreclosure of the subject Trust Deed and Trust Deed Note, the fees, costs and

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[3] Trust deeds generally provide (as did the Bank's here) that attorney's fees incurred by the beneficiary in defending the validity or priority of the trust deed in question are an indebtedness secured by the trust deed.

> expenses which Defendant has claimed in its Counterclaim.

(Reply to Counterclaim, Fourth Defense; R. 80, quoted at page 19 of the brief of respondent-plaintiff). It is true that Rothey utilized the word "estoppel" in his Fourth Defense. Rothey neglects to point out, however, that when asked by way of interrogatory to "[s]tate each fact supporting or providing the basis for the allegations contained in Fourth Defense of the Reply to Counterclaim herein" Rothey stated as follows:

> The Plaintiff relies for his Fourth Defense upon the fact that tender was made and accepted as stated in answer to Interrogatory No. 6 above and further upon the fact that the Defendant, as special administrator of the estate of Utahna P. Belnap, was entitled to seek the payment for all services rendered in that capacity as part of said proceeding. By reason of the fact that the Defendant failed to make application for reimbursement for all services rendered as part of this proceeding Defendant is thereby estopped from seeking those fees as part of the foreclosure of the subject Trust Deed.

(Answers of Plaintiff to Defendant's First Set of Interrogatories No. 7; R. 153) (emphasis added). Rothey also fails to note that at no time prior to the trial court's announcement of the decision was the trial court's theory mentioned, considered, or conceived by any party to this case.

Plainly, the estoppel theory pleaded by Rothey bears no relation whatsoever to the theory created by the

trial court. The trial court ruled that the Bank was estopped to claim the disputed attorney's fees because it had failed to keep the trustor and her successors advised of the attorney's fees and other expenses it was incurring in its defense against the Actions. This unique and unprecedented theory has nothing to do with Rothey's defense based on the fact that the Bank failed to request attorney's fees in connection with the probate of the estate of Utahna Belnap.

The law is clear that estoppel must be pleaded with particularity, and pleading one kind of estoppel does not permit proof of another. Kirk v. Kirk, 205 Okla. 482, 238 P.2d 808, 810 (1951); In re Anderson's Estate, 121 Mont. 515, 194 P.2d 621, 626-627 (1948). "Where a party seeks to raise an estoppel to a claim set forth in the pleadings, facts constituting an estoppel must be pleaded." Tracy Loan & Trust Co. v. Openshaw Investment Co., 102 Utah 509, 132 P.2d 388, 391 (1942) (emphasis added). Under these clear precedents, Rothey's failure either to plead or offer any proof with respect to the estoppel theory created by the trial court underscores the trial court's error. As the Court stated in Lagoon Co. v. Utah State Fair Association, 117 Utah 213, 214 P.2d 614, 616 (1950), "[t]he claim of estoppel must fail because of the lack of pleadings and evidence to allege and show such a defense."

Rothey's reliance on Cheney v. Rucker, 14 Utah 2d

205, 381 P.2d 86 (1963) (see Brief of Respondent-Plaintiff at 20-22), to support the trial court's creative jurisprudence is entirely misplaced. In fact, Cheney actually supports the Bank's position on this issue. The Court in that case eschewed a crabbed or formalistic reading of the requirement of Rule 8(c), Utah Rules of Civil Procedure, that affirmative defenses must be pleaded. The point of Rule 8(c), the Court stated, was notice, not a blind reliance on the pleadings. As the Court put it, "[w]hat they are entitled to is notice of the issues raised and an opportunity to meet them." 381 P.2d, at 91. In this case, the Bank received no notice of the estoppel theory ultimately created by the trial court. Rothey never pleaded nor argued such a theory and the Bank had no opportunity to meet it. Under Cheney, therefore, the trial court's reliance on an affirmative defense neither pleaded nor argued by Rothey was error.

Rothey also argues that the Bank was not prejudiced by the fact that the estoppel theory created by the trial court was neither pleaded nor argued by Rothey. Rothey claims that the Bank has not alleged "that had it understood the estoppel claim it would have (a) produced other evidence which was precluded, or (b) given other arguments which were not given." Brief of Plaintiff-Respondent at 22. Rothey's claim in this regard is difficult to fathom. Had the Bank

known that the trial court was going to rule based on the estoppel theory it created, the Bank would have argued vigorously the numerous reasons why neither the facts nor the law support such a theory. One need only look to the bulk of the Bank's Brief in chief to discover the arguments the Bank would have made to the trial court had the Bank been on notice as to the theory the trial court would ultimately create. See Brief of Appellant-Defendant at 12-36. Factually, the Bank would have offered proof that, contrary to the trial court's findings, Rothey was reasonably advised of the Bank's attorney's fees. That would not have been difficult, since Rothey himself was counsel to Mr. Belnap in the Actions. The Bank's prejudice resulting from lack of such notice is palpable.

Rothey's final attempt to support the trial court's unique estoppel theory is his argument that he and his predecessors relied to their detriment on the Bank's failure to give notice of the disputed attorney's fees. Beyond the fact that neither the law nor the Trust Deed imposed a duty on the Bank to give such notice, (see Brief of Appellant-Defendant at 21-28), there was absolutely no evidence of detrimental reliance on the Bank's actions in this regard produced by Rothey at trial. The record contains no hint that Rothey or his predecessors in interest would have acted any differently than they did had the Bank notified them of its claims and the amounts of the disputed attorney's fees. This fact is

underscored when it is noticed that Rothey's Brief does not cite a scrap of evidence supporting his argument on this issue. Brief of Respondent-Plaintiff at 23-27. It is not surprising, therefore, that the trial court made no finding as to reliance. Since reliance is an essential part of any estoppel defense, Jones v. Department of Employment Security, 641 P.2d 156, 161 (Utah 1982), the trial court's theory, even if lawful, pleaded, and at issue, must fail.

POINT III

THE LAW OF INDEMNITOR/INDEMNITEE IS A USEFUL ANALOGY IN THIS CASE

In its Brief in chief, the Bank asserts that the trial court's judgment is inconsistent with applicable law concerning contracts of indemnity. In particular, the Bank demonstrates that, unless specifically required by the terms of the indemnification agreement itself, an indemnitee has no duty to notify his indemnitor that he is incurring expenses for which the indemnitor may ultimately be liable. Brief of Appellant-Defendant at 21-25. Rothey attempts to undermine the Bank's criticism of the trial court's unprecedented action by pointing out the difference between contracts of indemnity and the Trust Deed. Brief of Respondent-Plaintiff at 27-29. It is informative to note, however, that Rothey (a) never addresses the fact that he did not plead the existence of such a duty on the Bank's part, (b) offers absolutely

no case law in support of the existence of such a duty,[4] and (c) fails to explain why, even if such a duty exists in the law, he failed to offer any proof at trial that it had been breached by the Bank. Nevertheless, Rothey's effort to explain away the cases relied upon by the Bank is not persuasive.

Rothey first argues that the cases cited by the Bank involve situations where the indemnitor had actual knowledge of the facts giving rise to the claim of indemnity. Brief of Appellant-Defendant at 19-20. It is difficult to discern Rothey's point in this regard. As the passages quoted in the Bank's brief make clear, these cases stand for the proposition that notice of the claim of indemnity need not be given to the indemnitor by the indemnitee. The cases can hardly be cited for the proposition that an indemnitor

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[4] At page 28 of his brief, Rothey states: "the rule is that in most situations an indemnitor is not bound by a judgment or settlement made by an indemnitee, and is thus not bound to pay the indemnity amount, unless notice and an opportunity to defend are first given to the indemnitor." The cases cited by Rothey do not support, much less state, this so-called rule. Chicago, R.I. & P.R. Co. v. Dobry Flour Mills, 211 F. 2d 785 (10th Cir.), cert. denied 348 U.S. 832 (1954), and Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, 509 P. 2d 86 (1973), are cases where the indemnitor had knowledge of the claim in dispute because the indemnitee actually requested that the indemnitor himself defend the claim in question. Neither case stands for the proposition that such a request, or even notice, is required in the absence of such a requirement in the contract of indemnity.

must have actual knowledge of the claim of indemnity in order for the indemnitee to recover. If that were true, the cases would hold that the indemnitee is bound to give notice of his claim to the indemnitor; a holding directly contrary to the actual holding of the cases.

Rothey next argues that the foreclosure of a security interest in real property is an action at equity and that the contract principles which define the indemnitee/indemnitor relationship are therefore not applicable to this case. Brief of Respondent-Plaintiff at 28-29. However, Rothey ignores the fact that the relationship between the parties to a trust deed is controlled by the trust deed as a matter of contract. "A mortgage is governed by the same rules of interpretation that apply to written instruments generally." Bank of Ephraim v. Davis, 559 P.2d 538, 540 (Utah 1977). The Trust Deed in this case provides that the Bank may defend against actions like the Actions and add costs incurred in such defense to the amount secured by the Trust Deed. The trial court specifically found this to be true. Conclusions Nos. 3 and 4; R. 347-348. This relationship, created as a matter of contract by the Trust Deed, is that of indemnitor (the Trustor) and indemnitee (the Bank): "Indemnity may be defined as the obligation resting on one party to make good loss or damage another party has incurred." Rossmoor Sanitation, Inc. v. Pylon, Inc., 119 Cal. Rptr. 449, 532 P.2d

97, 100 (1975). Consequently, the cases cited by the Bank at pages 22-25 of its Brief in chief are helpful in underscoring the fact that neither the trial court nor Rothey have offered any legal support whatsoever for the unique duty created by the trial court to support its equally unprecedented estoppel theory.

The Bank also points out that Rothey has made no attempt to answer the arguments set out at pages 25-28 of the Bank's Brief. As the Court will recall, the Bank there argues that the trial court's estoppel theory is ill-founded as well as unprecedented.

POINT IV

THE TRIAL COURT DID NOT RULE THAT THE BANK FAILED TO PROVE THAT IT WAS ENTITLED TO RECOVER ANY ATTORNEY'S FEES

Rothey's final argument is that the judgment should be affirmed because the trial court concluded that the Bank failed to prove it was entitled to any attorney's fees in connection with its defense against the Actions. Rothey contends that the trial court found that the evidence relied upon by the Bank to support the amount of its claim was "poisoned and should be totally discounted." Brief of Respondent-Plaintiff at 31. Rothey concludes from this that, even if the trial court's estoppel theory is unsupportable, its judgment should stand and "a remand of this case for any . . . reason would be to no avail. Even if it could be shown

that the Bank was entitled to any fees, it has failed to prove beyond a reasonable doubt the amount of those fees." Brief of Respondent-Plaintiff at 32. First and foremost, the trial court did not so rule -- the trial court ruled only that a portion of the statements of the Bank's counsel comingled services.

The trial court found and concluded as follows with respect to this claim:

[Findings of Fact]

> 5. That the Bank appeared in and defended each of the above-entitled actions and expended attorney's fees in connection with each action.
>
> 13. That commencing in 1974 counsel for the Bank prepared, on a periodic basis, statements for their services rendered, which statements were submitted to the Bank for payment and itemized the services performed not only for Civil Actions Nos. 209266 and 211151, but also other actions in which LeGrande L. Belnap was involved. The statements paid by the Bank and produced at trial totalled $31,130.49 for services rendered concerning Civil Actions Nos. 209266 and 211151 and certain other actions in which LeGrande Belnap was involved.
>
> 15. That certain of the statements for services rendered comingled services rendered in connection with Civil Nos. 211151 and 209266 with several other matters of litigation which the Court finds not to be specifically related to the above numbered actions and for which the Bank was not justified in charging fees pursuant to the Trust Deed which is the subject matter of this action.
>
> 16. That by reason of time and the manner in which certain of the statements for attorneys' fees were drafted, the

> Court is unable to determine what portion of the time listed on said statements is reasonable and legitimate in connection with Civil Nos. 211151 and 209266 and which is unreasonable and unrelated expense.
>
> [Conclusion of Law]
>
> 5. That the defendant has failed to show that the total sum of $31,130.49 constitutes a reasonable attorney's fee or that all of said fees were incurred in connection with any action purporting to affect the security of the Trust Deed, the title to the subject property, or the rights or powers of the beneficiary or Trustee.

(R. 342-348) (emphasis added).

Thus, according to the Court's own findings, the Bank expended attorney's fees in connection with each of the Actions. (Finding of Fact No. 5; R. 342). In addition, the Court found that "certain of the statements for services rendered comingled services rendered in [the Actions] with several other matters" and that by reason of the manner in which "certain of the statements" were drafted, the Court was unable to determine the portion of the time listed on "said statements" is reasonable. (Finding of Fact Nos. 15 and 16; R. 345-46). Thus, based upon the Court's own Findings, only "certain" of the statements so comingled services and only "certain" of the attorney's fees might be disallowed on this basis, even assuming that all of the Court's findings are adequately supported by the evidence. They are not.

James Lowrie testified that he was the attorney of record for the Bank in Civil Nos. 209266 and 211151 (the Actions) throughout their duration (T., 2/7/83, at 37-38; R. 409-410). The Bank was involved in certain actions in addition to Civil Nos. 209266 and 211151. For example, case number Civil No. 211425 was consolidated by the Third Judicial District Court of Salt Lake County with Civil No. 211151. (T., 2/7/83, at 51; R. 423). Part of the subject matter of Civil No. 211425 was an effort to enjoin the prosecution of a California Superior Court case involving certain real estate property in California. That case will hereinafter be referred to as the "California Case." As a part of Civil No. 211425, LeGrande L. Belnap sought to enjoin the prosecution of the California Case. 9T., 2/7/83, at 51-52; R. 423-24). In addition, the probate of the estate of Utahna P. Belnap was consolidated with Civil Nos. 211151 and 209266. (T., 2/7/83, at 52-53; R. 424-25). As a plain consequence of the interrelationship of these cases, it was practically impossible to separate the services that were rendered separately with respect to each.

Mr. Lowrie gave the Court a general summary of all services performed in Civil No. 209266. (T., 2/7/83, at 67-70; R. 439-442). That description of services included the initial preparation of an Answer, discovery, motions, the trial court's dismissal with prejudice, an appeal to this Court, and an affirmance of the Bank's position. Mr. Lowrie

also described generally the services rendered by his firm to the Bank with respect to Civil No. 211151, beginning with the filing of an Answer and Counterclaim, conducting of discovery, the engagement of and examination of experts, preparations for trial, the trial court's last-minute granting of a Motion for Summary Judgment, an appeal to this Court, and an affirmance of the Bank's position. (T., 2/7/83, at 70-81; R. 442-453).

Mr. Lowrie then identified all of the statements sent by his firm to the Bank covering services rendered in connection with Civil Nos. 209266 and 211151. (T., 2/7/83, at 81 et seq.; R. 453 et seq.). Exhibit 14 was received into evidence. (T., 2/7/83, at 85; R. 457). Mr. Lowrie reviewed each of the statements and testified about the services rendered and the amount of the time expended on each. (T., 2/7/83, at 87 et seq.; R. 459 et seq.). In addition, Mr. Lowrie testified, without contradiction, as follows:

> Q. Have you reviewed your record to determine approximately how much time you personally have spent in the defense of the Bank in Civil No. 211151 and 209266?
>
> A. Well, in defense of the Bank in an assertion of the Counterclaim through the conclusion of the appeal and the matters I reviewed, yes, I have.
>
> Q. And how many hours did you personally spend?
>
> A. In excess of 455 hours.
>
> Q. Have you reviewed your records to determine the total number of hours spent by legal personnel in the defense

of the Bank in 209266, and in defense of the Bank in the prosecution of the declaratory judgment counterclaim in 211151?

A. Yes.

Q. And how many hours, in the aggregate, have legal personnel of Jones, Waldo, Holbrook & McDonough expended in those?

A. In excess of 622.

Q. And what is the range of hourly rates charged by the lawyers -- not law clerks but lawyers of Jones, Waldo, Holbrook & McDonough for those services?

A. Well --

Q. I realize that the statements reflect them but just give us a range.

A. For Mr. Waldo, they were free. Otherwise they range from $35 an hour to $95 an hour.

Q. Do you have an opinion as to the reasonableness of the fees that were charged to the Bank for the defense of the Bank in 209266 and 211151, and if the prosecution of the declaration judgment counterclaim in the latter case?

A. Yes I do.

Q. What is that? ***

A. In my opinion, our fees have ranged from reasonable and generous to the Bank.

(T., 2/7/83, at 90-92; R. 462-464). There thus exists an uncontroverted basis for the recovery of attorney's fees that does not place reliance on any of the statements of Jones, Waldo, Holbrook & McDonough.

Further, counsel for Rothey stipulated that one attorney, Robyn Heilbrun, expended 141.6 hours on behalf of the Bank in conjunction with Civil No. 209266 at a billing rate of between $45 and $60 per hour:

> Mr. Smith [Rothey's counsel]: Your Honor, maybe we can shorten : she is simply going to testify to what is already in the statements, its there. We have an attorney's representation as to what he thinks is reasonable and how many hours and what was done and so forth, and we have been through that. Its just compounded, and I don't believe we need it.
>
> The Court: He's given you a man's perspective of that and she'll give you a woman's perspective.
>
> Mr. Smith: Probably the better perspective as well, but --
>
> Mr. Maak: We might be able to stipulate to a lot of this right now. If we will stipulate that she did what the statements say she did, then --
>
> Mr. Smith: I'll stipulate that what he's put down there is what she would testify she did, and that's --
>
> Ms. Heilbrun: That's the testimony I would proffer, Your Honor.
>
> Mr. Smith: I have no problem with that.
>
> Mr. Maak: And that you expended how many hours?
>
> Ms. Heilbrun: 141.6 hours myself.
>
> Mr. Smith: Is that in the statement?
>
> Ms. Heilbrun: Yes. That is the addition of the statements.

Mr. Smith: We can do that. And that's in 209266 and 211151?

Ms. Heilbrun: Yes.

Mr. Maak: And your billing rate for this period of time was between what and what?

Ms. Heilbrun: $45 and $60.

Mr. Smith: It's certainly unconscionable, but if that's what she's going to testify to, I have no problem.

The Court: Is that the billing rate to Walker Bank and Trust Company?

Ms. Heilbrun: Yes, Your Honor.

Mr. Maak: And finally, that the charges that were made to the Bank for her services were a reasonable fee for the service that she rendered in her opinion?

Mr. Smith: I think Mr. Lowrie has already testified to the entire fee.

Mr. Maak: She spent a significant amount of time. I just wanted her to be here.

Mr. Smith: I would stipulate with him as to what's been indicated here as being what her testimony would be.

The Court: So your time was 141.6?

Ms. Heilbrun: Through May of 1981. That does not include nonjudicial foreclosure or foreclosure in this case, which Mr. Lowrie has testified to.

(T., 2/7/83, at 121-125; R. 492-494)(emphasis added). Thus, the parties stipulated that Ms. Heilbrun would testify that she expended 141.6 hours at the rate of between $45 and $60 per hour and expended 141.6 hours "in 209266 and 211151."

Finally, it will be remembered that the trial court found that only "certain of" the Jones, Waldo, Holbrook & McDonough firm's statements to the Bank comingled services. Included in the record on appeal is plaintiff's Exhibit 14, which consists of the statements rendered by the Jones, Waldo, Holbrook & McDonough firm to the Bank for this and other matters. Many of those statements separately itemize the services and charges attributable exclusively to Civil Nos. 209266 and 211151. The following are only illustrative.

STATEMENT DATE	PAGE NUMBER	DESCRIPTION
5/11/76	1	Only concerned 209266 and 211151
9/16/76		
6/1/78	6	Concerns only 209266
8/1/78	5	Concerns only 209266
10/4/78	5	Concerns only 209266

Each statement specifies the services that were rendered in conjunction with Belnap matters. The trial court had before it the court's complete files in both Civil Nos. 209266 and 211151. (T., 2/7/83, at 25; R. 397). From those files, the Court can compare the dates upon which proceedings occurred in each of those cases and the references in the statements (such as preparation of brief, appearance at hearing, etc.) with the description of services to determine, with certainty, the case to which the services related.

In summary, the following independent evidentiary bases were presented to the trial court as evidence of a reasonable fee for services rendered by the Bank's counsel in conjunction with the Actions, Civil Nos. 209266 and 211151: First, Mr. Lowrie, the Bank's counsel, independently testified to the time expended and the range of reasonable fees that he charged. Second, Rothey's counsel stipulated that one of the Bank's counsel, Robyn Heilbrun, expended 141.6 hours at an hourly rate of between $45 and $60 for services rendered in conjunction with Civil Nos. 209266 and 211151. Third, many of the Bank's statements do not comingle cases upon which services were rendered and provide an independent evidentiary basis for the recovery of those fees. Fourth, even those few statements that comingled some services could be divided between the various cases based upon the contents of the files in Civil Nos. 209266 and 211151, both of which were before the trial court. Fifth, Mr. Lowrie testified, without contradiction, that the services rendered in Civil Nos. 209266 and 211151 were related to other actions, which were consolidated with the subject cases, and that the services rendered in conjunction with those other action were reasonably necessary to insure the protection of the Bank's interests in conjunction with Civil Nos. 209266 and 211151. Last, the trial court had before it Mr. Lowrie's description of the services that he rendered, and a file depicting the exact services rendered in conjunction with each case, both

of which provided an independent evidentiary basis upon which the trial court could have fixed a reasonable fee for the attorney's fees in question.

This case must be remanded to the Third Judicial District Court of Salt Lake County for a determination of the amount of costs and attorney's fees due the Bank under the Trust Deed and for further proceedings to foreclose the Trust Deed.

CONCLUSION

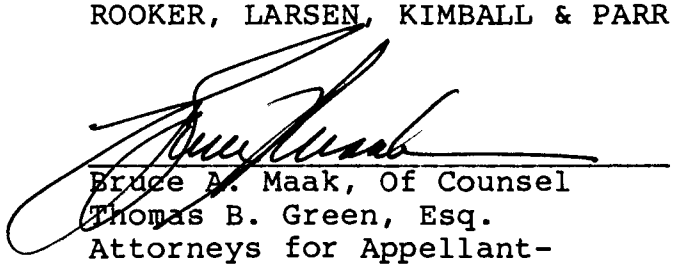
Rothey's Brief fails to address or addresses inadequately all of the arguments made in the Bank's Brief in chief. First, Rothey does not deny that the trial court found every fact necessary to support the Bank's recovery of its attorney's fees and costs incurred in the Actions. Second, Rothey does not deny that the trial court expressly rejected each defense advanced by Rothey's pleadings and arguments. Third, Rothey's contention that he asserted the estoppel theory ultimately created by the trial court is belied by Rothey's answers to the Bank's interrogatories. Rothey never pleaded nor argued any theory even remotely resembling the theory created by the trial court, and Rothey's Brief does not argue to the contrary. Fourth, Rothey cites no law in support of the trial court's theory and fails to respond to the Bank's argument that that theory is contrary to good sense. Fifth, Rothey has not cited to any evidence to support the finding, essential to the trial

court's dispositive theory, that the Bank failed timely to advise Rothey or his predecessors that it claimed the subject fees. Sixth, Rothey does not contend that the trial court made any finding that Rothey or his predecessors relied in any respect upon the Bank's conduct. Last, Rothey's claim that the Bank did not prove that any attorney's fees were recoverable is contrary to the trial court's findings and the record.

The Bank's arguments remain essentially unrebutted, and a plainer case for reversal cannot be conceived.

RESPECTFULLY SUBMITTED this 28 day of June, 1984.

ROOKER, LARSEN, KIMBALL & PARR



Bruce A. Maak, Of Counsel
Thomas B. Green, Esq.
Attorneys for Appellant-
Defendant
First Interstate Bank of Utah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing REPLY BRIEF OF APPELLANT-DEFENDANT were served this 29th day of June, 1984 by mailing on said date two copies thereof by United States Mail, first class postage prepaid, addressed to:

Duane R. Smith
POOLE, CANNON & SMITH
Attorneys for Respondent-Plaintiff
Prowswood Plaza, Suite 210
4885 South 900 East
Salt Lake City, Utah 84117

Thomas B. Green